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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY,
*Petitioner,*
v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; LIBERTY CAPITAL MARKETS, INC., A California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

J. M. DURETT, JR.
San Juan County Attorney
112 S. Mesa Verde
Aztec, NM 87410
(505) 334-9481

JAMES L. DOW *
DOW LAW OFFICE, P.A.
P. O. Box 128
Carlsbad, NM 88221
(505) 885-2185

* Counsel of Record
*Attorneys for Petitioner*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual Limited Partnership defendant, whose enterprise affairs were conducted through racketeering activities be immune from prosecution under 18 U.S.C. 1962(c), Racketeering Influenced Corrupt Organizations Act ("RICO"), because the person charged must be distinct from the enterprise which profited from its own racketeering activities.

2. Should the person-enterprise rule, as interpreted by a number of lower courts and the Tenth Circuit's interpretation in the case at bar be abandoned and should the Courts instead apply established criminal law principles to determine an entity's liability under RICO.

3. Should the Courts, by artificially construing the RICO statute, be allowed through these narow, restrictive judicial determinations, to develop and apply a doctrine that either partially or completely precludes entity liability under RICO and thereby avoid the congressional intent in enacting RICO.

4. The Trial Court correctly instructed the jury on the requisite mental state for liability required under a Rule 10b-5 claim promulgated under the Securities and Exchange Act of 1934. 17 C.F.R. Section 240. 10b-5(b).

5. That, even if the instruction was in error, did the defendant make a proper objection to the instruction as required by Fed. R. Civ. P. Rule 51.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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### OPINIONS BELOW

The May 28, 1992 Opinion of the United States Court of Appeals for the Tenth Circuit is reported at Board of County Commissioners of San Juan County v. Liberty Group, 965 F.2d 879 (10th Cir. 1992) and is reprinted in Appendix A. The prior opinion of the United States District Court for the District of New Mexico is not reported and is also reprinted in Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was entered May 28, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This case involves the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. Section 1962(c), which provides as folows:

> "18 U.S.C. Section 1962(c)
>
> . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

The full text of 18 U.S.C. Section 1962 is set out in Appendix D, Page 32a.

> "18 U.S.C. Section 1961(4)
>
> (4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;"

The full text of 18 U.S.C. 1961 is set out in Appendix D, Page 34a.

The case also involves the Fed.R.Civ.P. 51, which provides as follows:

> "*Fed.R.Civ.P. 51*
>
> . . . No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its

verdict, stating distinctly the matter objected to and the grounds of the objection."

The full text of Fed.R.Civ.P. 51 is set out in Appendix D, Page 38a.

## STATEMENT OF THE CASE

In June of 1986, the County, through its then County Treasurer, Ron Ashcroft (Ashcroft), began using Liberty Group, a California Limited Partnership, as its broker dealer for the investment of County's surplus funds in Government guaranteed securities. R. 6, Page 75. Liberty Group, acting through its account executive, who handled County's account, commenced "churning" the account, TR. Vol. II, Pages 162-163, charging excessive markups ranging from 3.3% to 45.3%. TR. Vol. II, Pages 124-176. Liberty Group and Gurley knowingly failed to disclose these markups to County. TR. Vol. II, Pages 28-46. Liberty Group and Gurley intentionally did a series of adjusted trades on each of the transactions, thus hiding the excessive markups and County's losses. TR. Vol. II, Pages 28-46. The information furnished to the County regarding these 13 transactions falsely led the County to believe it was making a very small profit. This false information was discovered when the State Auditor of New Mexico audited the County's account with Liberty Group on the 7th day of January, 1988. Plaintiff's Exhibit No. 62 Admitted into evidence, TR. Vol. II, Page 78. As a result of this audit, the County Attorney wrote Liberty Group a letter dated January 19, 1988, attaching a portion of the State Auditor's report, Plaintiff's Exhibit No. 62, demanding a return of the County's monies in the sum of $208,131.61. Plaintiff's Exhibit No. 46. Admitted into evidence, TR. Vol. I, Page 106. *Doyle Holmes, President of Liberty Capital Markets, Inc.*, replied to Baggett's letter, refusing to return any monies, and falsely trying to mislead County that the $208,000 was one side of an adjusted trade where the "broker-dealer acting as a principal sells a security to a customer

at a mark-up which reflects not only the current market value of the security, but also the loss incurred by the broker-dealer in an earlier or simultaneous transaction, in which the broker-dealer acting as a principal purchases a security from the same customer at a price above the prevailing market price." He tried to persuade the County to believe that it was Liberty Group that had suffered losses, and intimated in the letter that the SEC, the NASD, and the Securities Division of the State of New Mexico reviewed Liberty Group and Liberty Capital Markets' practice of conducting adjusted trades in the limited circumstances discussed above, and had taken no action. Holmes and Liberty Capital Markets asserted in Holmes' letter, "To date, neither the SEC, the NASD, nor the Division has apprised Liberty Group of any irregularity or illegality in the manner in which these trades were conducted." Plaintiff's Exhibit No. 47. Admittted into evidence, TR. Vol. I, Page 27. Holmes admitted these investigations had been conducted, and that he had not disclosed the outcome of the State's investigation to County. TR. Vol. II, Pages 121-123.[1]

On January 8, 1988, prior to the filing of this suit, Liberty Group and Liberty Capital Markets filed the amended Form BD with the NASD and the New Mexico Securities Division, certifying Liberty Capital Markets as successor in interest to Liberty Group had assumed

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[1] An adjusted trade is a practice and/or scheme whereby there is a contemporaneous purchase and sale of securities. Both the purchase and the sale are executed at prices away from the current market price. The sales transaction is executed in a manner to avoid recognition of losses; the purchase is executed at a price that is greater than the actual market price which incorporates an excessive mark up as well as recoups the adjusted loss from the prior sales. Such a practice is a fraudulent scheme under Sec. 10b of the Exchange Act of 1934 and Rule 10(b)(5) of the S.E.C. *In Re Transamerica Securities, Inc.* S.E.C. Administrative Proceeding No. 3-5810. *Findings and Order Imposing Remedial Sanctions, Dist. Conduct Committee for District No. 25 v. Liberty Capital Markets, Inc., et. al.* Complaint No. LA-4248.

and transferred all assets and liabilities. Plaintiff's Exhibit No. 39. Admitted into evidence, TR. Vol. I, Page 27. Thereafter, on March 8, 1988, the County filed suit in the New Mexico State Court. This cause was removed to the Federal District Court for the District of New Mexico, where trial by jury was held. Prior to the jury retiring, Defendants' attorney objected to the Trial Court's Jury Instruction No. 24 with respect to the scienter under 10b-5: TR. Vol. IV, Pages 56-57.

> "In Instruction number 24, I do note that it is an incorrect statement of the law with respect to 10b-5, with respect to the scienter element in the portion which reads: . . . 'he should have realized their significance in the making of an investment decision, or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.'
>
> The scienter element requires an intent to deceive, manipulate or defraud. I think under the Hurtzfielder (Phonetic) case that you have to show something more than this, which would be more of a simplest negligence standard instead of a gross negligence standard."

The objection was overruled by the Trial Court. The jury returned its verdict against Liberty Group, Gurley, and Holmes, finding they violated Rule 10b-5, and assessed damages at $188,223.09. The jury further found Liberty Group and Gurley violated RICO.

Judgment was entered on August 28, 1990, R. 15, Page 228 awarding reasonable attorney's fees, as provided by RICO. This judgment mistakenly omitted the law of the case that Liberty Capital Markets was the successor in interest of Liberty Group and had assumed all of its liabilities. R. 15, Page 228. Plaintiff filed a Motion pursuant to Fed. R. Civ. P. Rule 59 to correct the judgment and allow treble damages, attorney's fees, and to include Liberty Capital Markets as successor in interest to Liberty Group

and liable for the damages sustained by County. The trial court granted this motion and, accordingly, amended the judgment. Memorandum Opinion and Order, Appendix B, and R. 18, Page 268.

Defendants filed a motion for a J.N.O.V. and new trial with the Trial Court, raising the question: Whether an individual Limited Partnership defendant, whose enterprise affairs were conducted through racketeering activities be immune from prosecution under 18 U.S.C. 1962(c), RICO, because the person charged must be distinct from the enterprise which profited from its own racketeering activities. Defendants further objected on the grounds that the instruction allowed the jury to find liability based on negligence and because it failed to define recklessness, an omission that defendants now claim is highly prejudicial. The Trial Court in its Opinion dated November 1, 1962, Appendix B, denied the motion for a new trial. The Tenth Circuit Court of Appeals reversed the Trial Court's decision and granted a new trial on the 10b-5 liability issue.

The Tenth Circuit further reversed the RICO decision, holding: "The required separation between the RICO Enterprise and the defendant Liberty Group was not established and JNOV should have been granted to Liberty Group as to any liability under Section 1962(c)."

## REASONS FOR GRANTING THE WRIT

### I. THE COURTS ARE DIVIDED ON THE QUESTION

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. Section 1961-1968 (1982). Congress found that "organized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption. Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970).[2]

Section 1962 of RICO prohibits a "person" from investing, acquiring or operating an "enterprise" through a "pattern of racketeering activity". Widely acknowledged as one of the broadest federal statutes, *See* e.g., Strasser, Prosecutors, Private Bar Find New Uses for RICO, Nat'l. L.J., September 28, 1987, at 18, Col. 1 (RICO "a bit like the atomic bomb"). Many courts have

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[2] Congressional Statement of Findings and Purpose. Pub. L. No. 91-452, 84 Stat. 922 (1970). (Finding (1)), other findings: (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to beat the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

atempted to limit its scope. Notably those restrictive judicial interpretations that have reached the Supreme Court have been struck down.[3]

As a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric on whether the enterprise be ostensibly legitimate or admittedly criminal. The aim is to divest the association of the fruits of its ill-gotten gains. Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, the fact would not serve to limit the enterprise concept. *U.S. v. Turkette*, 452 U.S. 576 (1981).

Many of the lower courts, as the 10th Circuit in this case, have adopted the restrictive judicial interpretation of 1962(c) that the enterprise cannot be the same as the person.

The questions presented by this case is a question of federal law involving the 18 U.S.C. 1961(4). The United States Court of Appeals and the United States District Courts which have considered the question have rendered conflicting decisions.

The Eleventh Circuit repudiated the person-enterprise rule in a criminal case. In *United States v. Hartley*, the

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[3] *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) (criminal convictions for predicate acts must precede private civil suit for RICO violation; plaintiff must allege "racketeering injury" somehow distinct from that directly caused by predicate acts), rev'd. 473 U.S. 479 (1985); *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980) (RICO "enterprise" does not include individuals who engage exclusively in criminal activity), rev'd. 452 U.S. 576 (1981). See also *Russello v. United States*, 464 U.S. 16 (1983) (RICO is purposefully broad); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 107 S. Ct. 2759 (1987) (4-year federal Clayton Act statute of limitations applies to RICO); *Shearson-American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (civil RICO claims are arbitrable). *H. & J., Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987) (Predicate acts constituting part of a single scheme can never support a cause of action under RICO.) rev'd 492 U.S. 229.

United States Court of Appeals for the Eleventh Circuit concluded that "a corporation may be simultaneously both a defendant and the enterprise under RICO". *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982). The defendants in *Hartley* were convicted of conspiracy, mail fraud, violation of National Stolen Property Act, and Section 1962(c) of RICO. Upholding the RICO conviction that "if an individual were named as the enterprise, and a group of persons engaged in a pattern of racketeering activities with that individual, it would defy reason to suggest that the central figure (the enterprise) could not also be prosecuted under RICO. The *Haroco* court found the comparison to an association in fact unpersuasive, *Haroco v. American National Bank*, 747 F.2d 384, 401 (7th Cir. 1984). The Federal District Court in *U.S. v. Benny*, 559 F. Supp. 264 (N.D. CA. 1983). The *Benny* court also repudiated the person-enterprise rule, stating:

> ". . . if an individual defendant/enterprise cannot be prosecuted, he entirely escapes responsibility under RICO. Nothing in the statute implies that an individual defendant, whose affairs constitute the enterprise, should automatically be immune from prosecution under RICO. Although the defendant insists that he does not seek automatic immunity, such immunity would surely be the logical and inevitable result of this position. It may be true, arguendo, that Congress did not primarily intend to reach the 'lone racketeer' when it adopted RICO; yet it did clearly specify that such a single individual could be prosecuted if he conducted an enterprise through racketeering activities. And where the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Albernaz v. U.S.*, 450 U.S. 333 (1981); *United States v. LeFavre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975). If *Benny's* position were to prevail, he alone would escape prosecution; his co-defendants would still face RICO charges. Hence, the person whose business was

> at the core of the racketeering activity would be immunized, while those persons who worked for the enterprise could be prosecuted. Surely Congress could not have intended such an absurd and unjust result.

Indeed, two United States Courts of Appeal have decided cases recognizing the person-enterprise rule and also have in other cases recognized exceptions to the rule. The United States Court of Appeals for the 7th Circuit in *Masi v. Ford City Bank and Trust Company*, 779 F.2d 397 (7th Cir. 1985) repudiated the person-enterprise rule even though the 7th Circuit Court in *Haroco, supra*, held to the contrary. The *Masi* court in so ruling, stated:

> ". . . The district court dismissed Masi's RICO count because he brought this action against only Ford City Bank which, the district court believed, could not be both the 'person' and the 'enterprise' seemingly required by section 1962. In the time between the district court opinion and this appeal, this Court decided *Haroco, Inc. v. American National Bank and Trust Company of Chicago*, 747 F.2d 384 (1984), aff'd, 473 U.S. 606, 05 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). In that case, this court analyzed the necessary relationship between a person and an enterprise under the different subsections of 18 U.S.C. Section 1962. Id. at 399-402. We held that subsection (c) did require separate entities as the person and the enterprise but then stated:
>
> > 'However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal within the meaning of 18 U.S.C. Section 2, and if the person uses the income in the establishment or operation of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which

> suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. The approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it. [Emphasis added]

> Because the parties in *Haroco* elected not to appeal their 1962(a) claim, id. at 402 n.21, this paragraph is essentially dicta. However, we adopt it as our holding because of the reasoning expressed in Haroco and because we find that this literal reading of the statute is in accord with the Supreme Court's approach in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).
>
> Therefore, we conclude that the district court must be reversed and that Masi may proceed against the Bank as both the person and the enterprise allegedly using the income derived from racketeering activity. In so doing we express no opinion on the merits of plaintiff Masi's 1962(a) claim or the validity of the predicate acts upon which the claim is based."

Again, the United States Court of Appeals for the 10th Circuit has rendered conflicting decisions on the person-enterprise rule. In the case at bar, the 10th Circuit Court reviewed all of the evidence and found:

> "The required separation between the RICO enterprise and the defendant Liberty Group was not established and JNOV should have been granted to Liberty Group as to any liability under Section 1962(c).

> With respect to the defendant Gurley, he may be a person under 1962(c). Thus, the defect in proving a 'person' separate from the 'enterprise' is not present with respect to Gurley and a new trial for such defect is not required."

In the case at bar, the Limited Partnership was the perpetrator of the fraud and received all of the ill gotten gains of the fraud. The 10th Circuit in *Garbade v. Great Divide Mining and Milling Corporation*, 831 F.2d 212 (10th Cir. 1987), held:

> "The 'person' and 'enterprise' combination liability can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity, *Haroco, Inc. v. American Nat'l. Bank & Trust Co.*, 747 F.2d 384 (7th Cir.); also, where it is to disgorge illegally obtained proceeds, *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (7th Cir.); or where the statute seeks to reach the proceeds of illegal activities *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir.)."

The Ninth Circuit repudiated the person-enterprise rule in a civil case under Section 1962(c). *In Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), reversed the trial court, stating:

> "V. Conclusion
>
> The district court erred in dismissing Schreiber's RICO claims for: . . .
>
> 4. failure to allege a 'person' separate and distinct from 'enterprise' under section 1962(a), (b), and (c) with respect to the individual defendants John Lee and James Lee."

The court's reasoning in *Schreiber, supra*, was:

> " 'Logic dictates that a corporation, receiving income from a pattern of racketeering in which it has participated as a principal, can invest that income in its own operations.' *Pennsylvania v. Derry Construction*

> *Co.*, 617 F.Supp. 940, 943 (W.D. Pa. 1985). Thus, we hold that where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a). *Haroco*, 747 F.2d at 402."

Again, in *McCullough v. Sutter*, 757 F.2d 142 (7th Cir. 1985), the 7th Circuit Court of Appeals held that the enterprise and the person can be the same under 1962(c). Here, the Court pointed out that a sole proprietorship enterprise is not the same as a corporation enterprise in that:

> "If the one-man band incorporates, it gets some legal protection from the corporate form, such a limited liability; and is just this sort of legal shield for illegal activity that RICO tries to pierce. A one-man band that does not incorporate that merely operates as a proprietorship, gains no legal protection from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But if the man has employees or associates, the enterprise is distinct from him, and it makes no difference, so far as we can see, what legal form the enterprise takes. The only important thing is that it be either formally (as when there is a corporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual."

In the case at bar, we have a Limited Partnership composed of two general partners, namely, Liberty Partners and FMG Partners and Liberty Group, Ltd., which constitutes the enterprise. The general partners and the Limited Partnership received income from a pattern of racketeering activity and invested that income in its own operation. All that 1962(c) requires, as is said in *Haroco* and *McCullough*, *supra*, is "some separate distinct existence for the person and the enterprise, 747 F.2d at 402."

## II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

The issues raised in this case requires resolution by this Court for a number of reasons.

### A. The Need for Uniformity in Application of Section 1962(c) of RICO

First, the conflict of decisions among the Circuit Courts of Appeals leaves unsettled the question of whether an individual Limited Partnership Defendant whose enterprise affairs were conducted through racketeering activities and received the benefits of such activity be immune from prosecution under 18 U.S.C. 1962 (c), RICO, because the person charged must be distinct from the enterprise which profited from its own racketeering activities. This question is an important one which should be resolved by this Court due to the large number of racketeering activities by the enterprise which profits from its own racketeering activities. There is need for uniform application of the provisions of 1962(c) of RICO.

### B. The Need for Resolution of the Impact of the Definition of "Enterprise" Under Section 1962(c) of RICO

Second, the decision below, that an enterprise must be separate and distinct from the person, creates a conflict between the immunity to prosecution under Section 1962(a) and Section 1962(c) which should be settled by this Court. It is not at all clear that Congress contemplated the kind of distinction required by the person-enterprise rule in adopting the language of Section 1962(c). The consequences of the rule adopted by the Tenth Circuit in its decision are clearly contrary to the statute's purpose. RICO provided enhanced civil sanctions for those "persons" [4] that acquire or operate an "enter-

[4] 18 U.S.C. Section 1961(3) (1982) provides:

"Person includes any individual or entity capable of holding a legal or beneficial interest in property."

prise"[5] through a "pattern of racketeering activity"; in short, for those who engaged in "organized crime" in its generic, rather than stereotypical sense. *Sedima, S.P.R.L. v. Imrex Co., supra.*

The statutory definition of "enterprise" is in direct conflict with the decision of the Tenth Circuit in the case at bar and also with the other courts adhering to the person-enterprise rule.

### C. The Need for a Uniform Rule Within Section 1962(c)

Last, the decision below expressly creates a different rule which automatically immunizes from prosecution the enterprise entity which is the perpetrator of the racketeering activity and benefited from the activity while the employed person can be prosecuted. Surely Congress did not intend this ridiculous circumstance. *Innocence by association: Entities and the Enterprise Rule Under RICO.* 63 Notre Dame L. Rev. 179 (1988); *U.S. v. Benny, supra.*

### D. An Alternative Approach

There is need for a clear articulation of the standards of entity liability under RICO. To date, the courts have not only developed their own indiscriminate interpretation of RICO, but inspired others to do the same. Defining the appropriate criteria involves avoiding two equally undesirable outcomes. On the one hand, complete denial of the existence of corporations and other entities that conduct their own affairs through racketeering reduces the statute's effectiveness toward "providing enhanced sanctions and new remedies to deal with unlawful activities of those engaged in organized crime". *Congressional Statement of Findings and Purpose*, Pub. L. No. 91-452,

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[5] 18 U.S.C. Section 1961(4) (1982) provides:

"Enterprise" includes any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity."

84 Stat. 922 (1970). On the other hand, it would be a perverse result indeed if RICO, the statute designated to eliminate the influence of organized crime, were to become the vehicle for allocating the damage done by racketeering activity as an inevitable cost of doing legitimate business. *Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 Boston U.L. Rev. 561, 600 (1985).

Achieving the proper medium between these two extremes requires understanding two equally complex schemes. On the one hand, there are common legal distinctions between theories of liability. On the other hand, there is RICO.

In their attempt to limit corporate liability under RICO to its proper bounds, courts appear to have sought opportunities to turn the statute's language against itself, rather than to adapt traditional principals of entity liability to RICO. Thus, because a corporation or a limited partnership fits the statutory definitions of both "person" and "enterprise", courts have pondered whether the same corporation or limited partnership may be both a "person" and an "enterprise" at the same time. Their answer to this question appears to be "sometimes", i.e., "under some subsections", which subsections vary with the jurisdiction. With respect to subsection 1962(c), however, the answer is more uniform. Under that subsection, not only must there be a "person" and an "enterprise", but there must be an employment or associative relationship between the two. As a result, courts have also posited the question whether a corporation or limited partnership may be "employed by or associative itself". Their answer to this question appears to be a flat "No". In sum, the majority approach has been to contemplate whether certain person-enterprise relationships may exist in statutory parlance, rather than to articulate when the actual existence of such relationship may result in statutory liability.

The proper inquiry is not whether a corporation may be both the "person" and the "enterprise" at the same time. When a corporation or limited partnership is precluded from playing both roles, it cannot violate RICO by investing in itself or conducting its own affairs through criminal activity. Nor is the proper question whether a corporation or limited partnership may be employed by or associated with itself through an employee. A corporation or limited partnership can act only through its employees and agents. Phrasing the issue in the majority's terms distorts this reality. The question should be whether, if a person is "employed by or associated with" the corporation or limited partnership, the corporation or limited partnership may be liable for that "person's" RICO violation.

Principals of Agency and respondeat superior have historically provided the answer to the question whether a corporation may be liable for the illegal actions of its employees and agents. Courts appear to recognize, however, a distinction between the way agency and respondeat superior principles have been applied in criminal cases versus civil cases. In a civil antitrust case, for example, the Supreme Court suggested that vicarious civil liability may be imposed upon a corporation even though the employee may have acted without intent to benefit the corporation. *American Soc. of Mech. Eng'rs. v. Hydrolevel Corp.*, 456 U.S. 556, 567-68 (1982). Courts hearing criminal cases, however, have historically insisted upon an intent to benefit requirement. *New York Central & H.R.R. v. United States*, 212 U.S. 481, 494-99 (1909). *See* also *Restatement (Second) of Agency*, Sections 219(d), 248-249, 261-62 (1958); *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 275 N.E.2d 33 (1971).

Generally, the criminal law attributes to the corporation the unlawful conduct of employees or agents who act within the scope of their employment or authority and with the intent to benefit the corporation. Conversely,

actions taken by employees or agent for purely personal motives are normally considered to be their actions alone. *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 128 (5th Cir. 1962). When corporations are themselves victims of their employees' acts of racketeering, then the established doctrine of criminal law excuses the corporation from liability. *Gelbardi v. United States*, 287 U.S. 112 (1932); *United States v. Spitler*, 800 F.2d 1267, 1275-1279 (4th Cir. 1986). The penal component of Civil RICO's treble damages remedy and independently criminal character of the underlying acts of racketeering RICO requires, favor the application of such criminal standards of entity liability to all RICO cases, civil and criminal.

## III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON REQUISITE MENTAL STATE FOR LIABILITY REQUIRED UNDER A RULE 10b-5 CLAIM PROMULGATED UNDER THE SECURITIES AND EXCHANGE ACT OF 1934 17 C.F.R. 240.10b-5(b)

The Trial Court gave the following jury instructions. Trial Court's Jury Instruction No. 24:

> "The plaintiff, in order to recover on his 10B-5 claim must show that the defendant acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element the plaintiff must prove by the greater weight of the evidence that the defendant made material statements which he knew to be false, or made statements with reckless disregard for their truth or falsity, or knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision, or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading."

The Defendants objected that this instruction was an incorrect statement of the law. They asserted, "the sci-

enter element requires an intent to deceive, manipulate, or defraud. I think that under the [Hochfelder] case that you would have to show more than this, which would be more of a simplest [sic] negligence standard instead of a gross negligence standard." The objection was overruled.

The Trial Court specifically mandated in its instruction that, "The Plaintiff, in order to recover on his 10b-5 claim, *must show that the defendant acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud.* (emphasis supplied) The jury in its verdict found that the defendant acted with this requisite mental state. Under this charge that the jury "must show that the defendant acted knowingly, that is with a mental state embracing intent to deceive, manipulate or defraud", we do not believe that Hochfelder required more than this. Accordingly, Judge Mechem's charge to the jury was not reversible error or that fundamental injustice occurred. *U.S. v. Chiarella*, 588 F.2d 1358 (2nd Cir. 1978), rev'd. on other grounds, 445 U.S. 222 (1980).

Under this instruction it is clear that, before the Plaintiff could recover on its 10b-5 claim, it was mandatory that the jury find the defendant acted knowingly, that is with a mental state embracing intent to deceive, manipulae or defraud. If one acts intentionally, his acts are more than simplistic negligence.

Throughout the history of this case, the Plaintiffs proceeded on a theory of liability premised on intentional, knowing conduct, and that defendants acted with intent to defraud or intentional misconduct. The definition of scieter as outlined in the relevant cases is "a mental state embracing intent to deceive, manipulate or defraud". *Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Thus, the wording of the instruction was taken almost verbatim from the definition of scienter as stated in *Hochfelder, id.*

It is important to point out at this time that defendants' objection to the instruction merely stated:

> "The Scienter element requires an intent to deceive, manipulate or defraud. I think under the [Hockfielder] that you would have to show more than this, which would be more of a simplest [sic] negligence standard instead of a gross negligence standard."

There was no objection before the case went to the jury for the failure of the court to define "Recklessness" in its instructions to the jury.

### A. Defendants' Objection to the Instruction Was Not Sufficient Under Fed.R.Civ.P. Rule 51 To Preserve the Question for Review

Fed.R.Civ.P. Rule 51 is very specific as to how the objection is to be stated in order to preserve the matter for review. The rule makes it mandatory before a party may assign as error the giving or failure to give an instruction, the party must object and state distinctly the matter objected to and the grounds of the objection. The defendants failed to object to the court's failure to give their requested instruction on Recklessness, or that the court failed to instruct on the definition Recklessness. This question was first raised in their motion for a JNOV or in the alternative a new trial, after the case was given to the jury and the jury had rendered their verdict.

The Trial Court noted this in its Memorandum Opinion and Order of November 1, 1990 at Page 15, Appendix B. P.27a. Judge Mechem stated:

> "Defendants now object on the grounds that the instruction allowed the jury to find liability based on negligence and because it failed to define recklessness, an omission that defendants now claim is highly prejudicial. However, during objections to instructions at trial, defendants' objection was that '[t]he scienter element requires an intent to deceive, manipulate, or defraud . . . . [Y]ou have to show some-

> thing more than this, which would be more of a simplest negligence standard instead of a gross negligence standard.' Defendants did not object to the omission of a recklessness definition at trial. No party can claim error in the failure to give an instruction unless he objects to it before the jury retires. Fed.R.Civ.P. 51 and *Zimmerman v. First Federal Savings & Loan Ass'n*, 848 F.2d 1047 (10th Cir. 1988)."

The Trial Court took the same wording in its Scienter Instruction No. 24 from Defendants' Requested Jury Instruction No. 32. Appendix C, Page 30a. The Trial court did not give the full Requested Instruction No. 32; the portion of the instruction on Recklessness was deleted from the Court's Instruction No. 24, Appendix C, Page 30a, Defendants' Requested Jury Instruction No. 32.

Regarding defendants' claim that the language in Instruction No. 24 was eroneous, "[a] party who claims plain error has the heavy burden of demonstrating fundamental injustice. *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 442 U.S. 1007 (1975). In *Clegg*, the Tenth Circuit addressed the question of whether the jury instruction adequately informed the jury on the issue of scienter in a Rule 10b-5 claim. The Tenth Circuit found that:

> "If the trial court had charged the jury in effect that untrue statements or omissions resulting from mere negligence *without any manner or scienter, conscious fault, intention or recklessness*, would have justified a recovery against Conk, this would have been fundamentally or palpably wrong and subject to correction here despite question as to the sufficiency of exceptions below.[17]

[17] Cf. Fed. R. Cr. P. 52(b). See Hormel v. Helvering, 312 U.S. 552 (1941); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951); State v. Neustadt, 149 F.2d 143 (10th Cir. 1945); National Fire Ins. Co. v. School Dist. No. 68, 115 F.2d 232 (10th Cir. 1940). Cf. Murphy v. Dyer, 409 F.2d 747 (10th Cir. 1969).

But for the very reason that the language of the Act tells us that such a charge would have represented a fundamental departure from its purpose and *implied that simple negligence would not be enough.*[18]

[18] See footnote 8 for the trial court's charge as to Conk.

To us there is an undoubtable implication of fault beyond mere carelessness in 'engaging in any device, scheme, or artifice to defraud or the making of untrue statements of material fact or omitting to state any material fact necessary in order to make statements made in the light of the circumstances not misleading.' Laymen, in the context of the other instructions, would be likely to sense this, even though there is ground for dispute among lawyers that 'untrue' statements and the 'misleading' of others by omissions to state material facts could result simply from innocent though negligent oversight.

There is nothing in the record to suggest that the jury was misled in this case in any fundamental sense. On the contrary, even the partial record placed before us suggests that the nature of the conduct on which appellant's liability must have been predicated, as distinguished from the type of conduct on the basis of which his codefendant was acquitted, was necessarily pursued knowingly and intentionally and with purpose to mislead. A party who claims error within the reach of Rule 51, Fed. R. Civ. P., cf. Rule 52 Fed. R. Cr. P., has the heavy burden of demonstrating fundamental injustice. This the plaintiff has not done.

We do not mean to suggest generally that submission of the issues in the statutory language is enough when a proper request to charge is submitted to the trial court or timely exception is taken to the instructions as given or to a failure to charge on the subject. Indeed the defendant protected by such a request or exception is entitled to have his theory of defense specifically submitted to the jury in the context of the particular [*1363] record facts and

consistently with the decisions of this court on the points under discussion.

> We hold that the instructions sufficiently recognized the requirement of 'scienter' or conscious fault to withstand an attack on the ground of fundamental error and that. beyond this, there was no request or exception preserving for review any technical deficiency." (emphasis supplied)

There was no timely and sufficient exceptions taken as to any instruction on the point. After the Instructions were given and the jury had rendered its verdict, the failure to instruct on Recklessness was objected to. This fell far short of a timely or effective exception to preserve the point in view of the absence of any fundamental error. Fed. R. Civ. P. Rule 51; *Clegg v. Conk, supra; Radio Corporation of America v. Radio Station KYFM, Inc.*, 424 F.2d 14 (10th Cir. 1970); *Smith v. Greyhound Lines, Inc.*, 382 F.2d 190 (10th Cir. 1967); *Great-West Life Assurance Company v. Levy*, 382 F.2d 357 (10th Cir. 1967); *Dunn v. St. Louis-San Francisco Railway Company*, 370 F.2d 681 (10th Cir. 1966).

## CONCLUSION

Three important reasons exist for this court to resolve the question presented in this case.

First, the United States Courts of Appeals have divided on the question, resulting in lack of uniform application of whether a corporation or limited partnership may be simultaneously both a defendant and the enterprise under RICO.

Second, the decision below, that an enterprise must be separate and distinct from the person, creates a conflict between the immunity to prosecution under Section 1962(a) and 1962(c) which should be settled by this court. It is not at all clear that Congress contemplated

the kind of distinction required by the person-enterprise rule in adopting the language of Section 1962(c).

Last, the consequences of the rule adopted by the Tenth Circuit in its decision are clearly contrary to the Statute's purpose.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

J. M. DURETT, JR.
San Juan County Attorney
112 S. Mesa Verde
Aztec, NM 87410
(505) 334-9481

JAMES L. DOW *
DOW LAW OFFICE, P.A.
P. O. Box 128
Carlsbad, NM 88221
(505) 885-2185

* Counsel of Record

*Attorneys for Petitioner*

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## APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 90-2266

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
*Plaintiffs/Appellees,*

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY;
*Defendants-Appellants,*

and

LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; LIBERTY CAPITAL MARKETS, INC., A California Corporation; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES, *Defendants.*

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No. 90-2275

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
*Plaintiffs/Appellees,*

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES,

and *Defendants,*

LIBERTY CAPITAL MARKETS, INC., a California Corporation,
*Defendant-Appellant.*

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No. 91-2166

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
*Plaintiffs-Appellants,*

v.

LIBERTY GROUP, A California Limited Partnership; LIBERTY CAPITAL MARKETS, INC., A California Coporation,
*Defendants-Appellees,*

and

PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,
*Garnishee-Appellee.*

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Appeal from the United States District Court for the District of New Mexico

(D.C. No. 88-414-M)

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(Filed May 28, 1992)

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Submitted on the briefs:

Don A. Proudfoot, Jr. of Graham & James, Los Angeles, CA (Alexis H. Johnson of Sutin, Thayer & Browne, Albuquerque, NM, with him on the brief), for Appellants Liberty Group, Liberty Capital Markets, Inc. and Norman Gurley.

James O. Browning (Raul A. Carrillo, Jr. with him on the brief), of Browning, Peifer & Wishner, P.A., Albuquerque, NM for Garnishee-Appellee Prudential-Bache Securities, Inc.

James L. Dow of the Dow Law Office, P.A., Carlsbad, NM (B.J. Baggett, Aztec, NM, with him on the brief), for Appellee San Juan County.

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Before HOLLOWAY and MCWILLIAMS, Circuit Judges, and CAUTHRON,* District Judge.

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HOLLOWAY, Circuit Judge.

This appeal arises from an action instituted by the plaintiff-appellee County of San Juan, State of New Mexico to recover damages it claims it sustained in securities transactions with the appellant Liberty Group. The County alleged violations of a number of federal securities laws and of RICO. After a jury returned a verdict against the defendants they moved for a new trial on the federal securities claim and for JNOV or a new trial on the RICO claim. These motions were denied. An appeal was taken to this court. Meanwhile cross motions to amend the judgment were made. The district court granted both motions, and Liberty Capital, the successor in interest to Liberty Group, appealed the grant of the County's motion. While this second appeal was pending, a writ of garnishment was issued to one of Liberty Capital's debtors. Liberty Capital moved to have the writ quashed. The district court quashed the writ and the County commenced the third appeal. The three appeals are consolidated here and will be disposed of by this opinion.

I

In 1985 San Juan County, New Mexico adopted a new investment policy which provided that a portion of its funds was to be invested in various government backed securities. The County used a number of different brokers for these investments. Liberty Group was the County's broker for thirteen such transactions, with Norman Gurley (Gurley) acting as the Liberty Group account executive in charge of the County's transactions. On

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* The Honorable Robin J. Cauthron, United States District Judge for the Western District of Oklahoma, sitting by designation.

these transactions Liberty Group charged the County a markup over the price Liberty Group had paid for the bonds. The County was never informed of these markups, which it maintains were as high as 40%.

After the markups were discovered by the State Auditor, the County brought suit. The second amended complaint, upon which the trial was held, named Liberty Group; its general partners, Liberty Partners and F.M.G. Partners; Liberty Capital Markets, the successor in interest to Liberty Group; Norman Gurley; and Doyle Holmes, the President of Liberty Capital, as defendants.[1] The County sought damages for violations of SEC Rule 10b-5 and the Racketeer Influenced and Corrupt Organization Act (RICO). 18 U.S.C. §1982(c). The jury found that Norman Gurley, Doyle Holmes, and Liberty Group had violated 10b-5 and that Gurley and Liberty Group had violated RICO. Damages were assessed at $188,223. On the basis of separate motions by the County and Doyle Holmes, the trial court amended the judgment to treble the damages as provided by RICO and granted judgment non obstante veredicto in Holmes' favor.

The County and Liberty Capital Markets (Liberty Capital) then filed cross motions to alter or amend the judgment. The County sought to have the judgment reflect the parties' pretrial stipulations that Liberty Capital Markets was the successor in interest to Liberty Group and that when Liberty Capital succeeded to Liberty Group's registration as a broker-dealer it had

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[1] Prudential-Bache Securities was originally named as a defendant but the claim against it was dropped shortly before trial. Also named were Chester Walker, a general partner of Liberty Group; Robert Holmes, President of Liberty Partners; Steve Holmes, President of Liberty Capital; and James Graham, Secretary of Liberty Partners. The County's claims against Graham were dismissed without prejudice before trial. At the close of evidence, a directed verdict was entered in favor of Robert and Steve Holmes and Chester Walker.

filed a form with the State of New Mexico announcing that it was assuming all of Liberty Group's assets and liabilities. Liberty Capital moved to have the judgment reflect the verdict that it was not liable for any wrongdoing of its own and to have those counts not submitted to the jury dismissed with prejudice. The trial judge granted *both* motions and entered a corresponding amended judgment.

Gurley and Liberty Group timely brought the first of these appeals, No. 90-2266, from the denial of their new trial and JNOV motions. They argue that the district court erroneously instructed the jury on the requisite state of mind for a 10b-5 violation and that there was insufficient evidence to support the finding of a RICO enterprise. Liberty Capital appealed the amended judgment on December 13, 1990, commencing appeal No. 90-2275. Liberty Capital's principal claim is that the jury verdict did not find it liable as Liberty Group's successor and that the amended judgment should be changed to omit any reference to Liberty Capital as Liberty Group's successor in interest.

After entry of the amended judgment and the consequent appeals to this court, the County sought to execute what it claimed to be a judgment against Liberty Capital as Liberty Group's successor in interest. A writ of garnishment was issued naming Prudential-Bache Securities Inc. (Prudential-Bache) as garnishee. Prudential-Bache held notes in Liberty Capital's account to cover Liberty Capital's trading obligations. Liberty Capital filed a motion to quash the writ. The trial court denied the motion to quash. Liberty Capital then filed a motion seeking to have the court clarify and reconsider its denial of the motion to quash.

On June 17, 1991 the district court issued a memorandum opinion and order in which it quashed the writ.

It held that the propriety of the writ turned on whether Liberty Capital was liable by virtue of successor liability for the judgment against Liberty Group. Since the jury had not reached the issue, the district court opined that it could appropriately determine that question itself. It held that since the matter had not been litigated and since there is no vicarious RICO liability, Liberty Capital could not be named a judgment debtor. The writ was accordingly quashed. The County appealed this decision in Appeal No. 91-2166, which forms the third appeal consolidated here. The County argues that the district court was without jurisdiction to alter the judgment once the case was on appeal.

II

Liberty Group and Gurley make two primary arguments to this court in No. 90-2266. They argue that the district court gave an erroneous instruction to the jury which allowed the jury to find a violation of Rule 10b-5 based no negligent failure to disclose when the proper standard, Liberty Group and Gurley maintain, is a reckless failure to disclose. They seek a new trial on this count. Secondly, they seek a JNOV or a new trial on the RICO charge because they claim that there was no evidence introduced that showed an enterprise separate from the defendant Liberty Group, and with its own purpose, structure, and decision-making capability as required by 18 U.S.C. 1962(c).

Rule 10b-5 promulgated under the Securities and Exchange Act of 1934 makes it unlawful

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the

circumstances under which they are made, not misleading, or

(c) to engage in any act, practice, or course of business which would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(b).

The basis of the County's claim against the defendants is that Liberty Group churned the County's account by making frequent trades and charging markups on the transactions which were both excessive and undisclosed. The parties have agreed that the markups were undisclosed. Appellant's Brief at 10. The central issue at trial was thus whether the markups were so excessive that the failure to disclose them constituted fraud of the sort prohibited by Rule 10b-5. The parties accordingly marshalled experts who gave contradictory testimony as to the reasonableness of the markups. Tr., Appellant's Appendix at 377 and 384-87.

After the close of the evidence the court instructed the jury as to the law. Instruction 24, which is challenged here, described the requisite mental state for liability on a 10b-5 claim.

The plaintiff, in order to recover on his 10B-5 claim, must show that the defendant acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element the plaintiff must prove by the greater weight of the evidence that the defendant made material statements which he knew to be false, or made statements with reckless disregard for their truth or falsity, *or knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision*, or knew of the existence of material facts

> which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Joint Appendix at 274 (emphasis added).

The defendants objected that this instruction was an incorrect statement of the law. They asserted that "[t]he scienter element requires an intent to deceive, manipulate, or defraud. I think that under the [*Hochfelder*] case that you would have to show more than this, which would be more of a simplest [sic] negligence standard instead of a gross negligence standard." Tr., Joint App. at 77-78. The objection was overruled.

On appeal the appellants elaborate on their initial objection by arguing that *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976), established that 10b-5 liability requires much more than mere negligence. This reading is correct. *Id.* at 193. Although *Hochfelder* established the principle that scienter is required to generate 10b-5 liability, it expressly declined to decide whether recklessness is sufficient to constitute scienter. *Id.* at 194 n. 12. This Circuit has since answered the question in the affirmative. *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982) ("At this time we expressly hold that recklessness satisfies the scienter requirement.") The County cites contrary authority for the proposition that Rule 10b-5 is violated whenever facts material to an investment decision are intentionally withheld. *Tager v. S.E.C.*, 344 F.2d 5, 8 (2d Cir. 1965); *Charles Hughes & Co. v. S.E.C.*, 139 F.2d 434, 435 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944). The County's precedents are largely inapposite, however, and all predate the Supreme Court's ruling in *Hochfelder* and our holding in *Hackbart*. Reviewing the instructions as a whole, we hold that the trial court's instruction that allowed a finding of fault based on the simple negligence

standard of "should have realized" was therefore error as a matter of law.[2]

The County argues, however, that even if the instructions were in error, Liberty Group did not make a proper objection to the instruction as required by Fed. R. Civ. P. Rule 51. The County points out, correctly, that the defendants at trial asserted that the proper standard was one of gross negligence and not the recklessness standard which they now propose. The County, echoing the district court's reasoning denying the defendants' new trial motion, argues that the defendants may not now raise this objection absent plain error. We disagree because we find that a proper and timely objection was made.

Liberty Group identified the specific instruction to which they objected. They stated the general grounds for the objection—that 10b-5's scienter requirement demands a showing of a higher quantum of culpability than that entailed in simple negligence. Furthermore, they cited the specific Supreme Court case which established this proposition. The only possible mistake made by Liberty Group was that they requested an instruction on gross negligence and not the presumably somewhat more stringent recklessness standard. Yet the line between gross negligence and recklessness is a fine one at best. "[T]here is often no clear distinction at all between [recklessness] and 'gross' negligence, and the two have tended to merge and take on the same meaning." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, p. 214 (1984).

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[2] On remand the district court should take care to incorporate into its instructions the essence of the definition of scienter outlined in the relevant cases. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Hochfelder*, 425 U.S. at 193. This intent requirement can be satisfied by a showing of recklessness. Reckless behavior is conduct that is "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or so obvious that the actor must have been aware of it." *Hackbart*, 675 F.2d at 1118.

*See Britt v. Allen County Community Junior College*, 638 P.2d 914, 920 (Kan. 1982) (equating gross negligence with reckless disregard for consequences); *Fassett v. Santiam Loggers, Inc.*, 517 P.2d 1059, 1060 (Or. 1973) ("Gross negligence is the equivalent of reckless disregard."); *St. Onge v. Detroit and Mackinac Railway Co.*, 321 N.W.2d 865, 867 (Mich. 1982) (holding that gross negligence "has essentially the same meaning as the term 'recklessness'").

"[I]f the objection properly calls the alleged error to the court's attention and relates to the court that an exception is taken to the instruction, the requirement of [Rule 51] is met." *Taylor v. Denver and Rio Grande Western Railroad Co.*, 438 F.2d 351, 353 (10th Cir. 1971). Without in any way implying that gross negligence and reckless conduct are legally synonymous, we hold that under the circumstances the defendants' reference to gross negligence was sufficient to alert the district court to the issue of the degree of culpability necessary to constitute scienter. The defendants' objection that *Hochfelder* requires a finding of gross negligence rather than simple negligence was sufficient to fully inform the court of the specific nature of and grounds for the objection. The objection was thus sufficiently preserved on appeal.

Given that the defendants timely objection to the state of mind instruction and that the challenged instruction was erroneous, there remains only the question of whether or not the error was prejudicial. When a timely, well-taken objection is made to jury instructions, the beneficiary of the error, in this case the County, has the burden of showing that the error "almost surely did not affect the outcome of the case." *Lusby v. T.G.&Y. Stores, Inc.*, 796 F.2d 1307, 1312 n.4 (10th Cir. 1986), *cert. denied*, 479 U.S. 884 (1986).[3] The focus of the trial

[3] The appellees would have us apply the standard used in *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007

was on the failure to disclose. Answer Brief at 15. The County made no real attempt to show affirmative misrepresentations. The defendants' liability thus turned almost entirely on just how culpable their failure to disclose was. Based on our review of the briefs and of the record as a whole it is clear that the appellees have not met their burden of showing that the trial court's instruction allowing a finding of liability based on simple negligence rather than recklessness was harmless. The judgment of the trial court as to 10b-5 liability must accordingly be reversed and a new trial ordered.

## III

The second claim of error of Liberty Group is that there was a failure of proof of an element necessary to establish a violation of RICO. We review de novo the district court's denial of the motion for judgment notwithstanding the verdict. *Johnsen v. Independent School District No. 3*, 891 F.2d 1485, 1489 (10th Cir. 1989). We therefore apply the same standard as applied by the trial court. The denial of a motion for a JNOV will be overtunred only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. *Ralston Development Corp. v. United States*, 937 F.2d 510, 512 (10th Cir. 1991).

18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

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(1975). In *Clegg* this Court refused, in circumstances generally similar to those now before us, to order a new trial absent a showing of fundamental error. *Id.* at 1363. However, in *Clegg*, there had been no proper objection to the challenged instruction at trial. Here there was such an objection.

As the jury instructions and the predominant view in the cases make clear, under § 1962(c) it is required that the "person" and the "enterprise" engaged in racketeering activities be different entities. *See Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987).[4] The district court took the position that the verdict against Liberty Group was supported by the evidence that Liberty Group itself was the enterprise. Memorandum Opinion and Order at 7-8. We are persuaded that this was error under the cases cited. The language of the statute clearly contemplates that the "person" charged will be distinct from the "enterprise", since a person cannot logically be "employed by or associated with" himself. If Liberty Group is found to have violated RICO, liability under § 1962(c) must be based on Liberty Group's association with some entity separate from itself. The County thus had the burden of proving that these defendants were part of an enterprise which had an existence and purpose distinct from any one of them to establish § 1962(c) liability.

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[4] Eleven circuits have addressed this issue, and all but one have found that the RICO "enterprise" and the "person" must be distinct. *See Yellow Bus Lines v. Local Union 639*, 839 F.2d 782, 789-90 (D.C. Cir. 1988), *rev'd on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (en banc); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 30 (1st Cir. 1986); *Horoco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir. 1984); *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *judgment vacated on other grounds*, 469 U.S. 1205 (1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *Cf. United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). For a discussion of the evolution of this doctrine see David Smith and Terrance Reed, *Civil RICO*, ¶ 3.07 (1992).

The County identifies the RICO enterprise as an association in fact among Liberty Group, Liberty Partners, F.M.G. Partners, Liberty Capital Markets, Norman Gurley, and Doyle Holmes. This was how the case was submitted to the jury. Instruction No. 12, Joint App. at 260. The defendants counter that the alleged association in fact was nothing more than Liberty Group itself. In their view the evidence which purportedly showed an association in fact showed nothing more than the various officers and employees of Liberty Group carrying on the firm's business. Under *Old Time Enterprises v. International Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989), a separate enterprise is not demonstrated by the mere showing that the corporation committed a pattern of predicate acts in the conduct of its own business. *Id.* at 1217. Thus, the defendants maintain, there was a total failure of proof of an enterprise separate from the defendant, Liberty Group. After a close examination of the record we must agree.

In its answer brief the County gives a careful description of how the alleged association in fact carried out its business, relying heavily on the testimony of Doyle Holmes. Answer Brief at 21-23. It was Holmes' testimony at trial which laid out the operating procedures of the enterprise's securities business. Despite the County's claims, at no point did Holmes describe activity by any enterprise other than Liberty Group itself. The "association's" business in New Mexico began with the receipt of a license to act as a broker-dealer in the state. Second Amended Complaint, Appellee's App. at 4. Liberty Group's statement that it would not maintain an office in the state was signed by James Graham in his capacity as secretary of defendant Liberty Partners, a general partner of Liberty Group. Tr., Appellee's App. at 201. The account executives who were licensed to operate in New Mexico were Jim Culhane and the defendant Norman Gurley, employees of Liberty Group. *Id.* at 202.

It was Norman Gurley who handled the San Juan account.

A bond transaction would begin after a conversation between an account executive and his client ended in the determination that a particular security should be bought or sold. The account executive would then notify the trading desk, usually the defendant Chester Walker, a general partner of Liberty Group. *Id.* at 204. Second Amended Complaint at 3. Calls were then made to clearinghouse brokers such as Prudential-Bache seeking quotes. If the price quoted was acceptable the transaction would be made. Tr., Appellee's App. at 204-205. Prudential-Bache would record these transactions in Liberty Groups' house account, and send a monthly statement to the client. Tr. at 78-79. Plaintiff's Exh. 31-A. The decision on how much of a mark-up to charge clients was made by George Gabel, compliance officer and sales manager of Liberty Group. Tr., Appellee's App. at 82-83.

Every individual involved in setting up the business in New Mexico, trading securities, and determining markups was thus an employee or officer of Liberty Group itself. The license to do business and the trading accounts with Prudential-Bache were both in Liberty Group's name. Although there was some testimony that "Liberty" took one action or another, this was always in a context which made it clear that the entity referred to was Liberty Group and not some amorphous association in fact.

In short, the appellees point to no evidence that the alleged association and its activities were anything more than Liberty Group going about its ordinary business of dealing in securities by and through its officers and employees. A legal entity, such as Liberty Group Ltd., can perform an action or make a decision only through human intermediaries, such as the individual defendants here. Courts have accordingly found that the officers and employees of an organization cannot, in the ordinary course

of their duties, constitute an association in fact separate from the organization itself. *Yellow Bus Lines Inc. v. Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989), *cert. denied*, 111 S.Ct. 2839 (1991); *Moffatt Enterprises, Inc. v. Borden, Inc.*, 763 F. Supp. 143, 149 (W.D. Pa. 1990). Thus there was a complete failure of proof at trial of an association in fact separate from Liberty Group. The required separation between the RICO enterprise and the defendant Liberty Group was not established and JNOV should have been granted to Liberty Group as to any liability under § 1962(c).

With respect to the defendant Gurley, he may be a "person" under § 1962(c). Thus the defect in proving the existence of a "person" separate from the "enterprise" is not present with respect to Gurley, and a new trial for such defect is not required. Nevertheless, the verdict against him must be set aside for the error discussed earlier with respect to the instruction on the underlying securities fraud claim which premised the RICO judgment against Gurley.

## IV

In sum, the district court erred in instructing the jury concerning 10b-5 liability. Therefore, new trials must be granted with respect to the federal securities claims of the plaintiffs against both Liberty Group and Norman Gurley.

With respect to the RICO claim against defendants Liberty Group and Liberty Capital, the judgment and amended judgment are being set aside for insufficiency of the evidence as explained above. In the event of such a reversal of the judgment, the appellate court may determine that the appellee is entitled to a new trial, or it may direct that the trial court determine whether a new trial should be granted. Fed. R. Civ. P. 50(d); *Neely v. Eby Construction Co.*, 386 U.S. 317, 329 (1967); *Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471,

1480 (10th Cir. 1985). We conclude that we should leave the determination of whether a new trial should be had on the RICO claim against the defendants to the district court.

Accordingly, in No. 90-2266, the judgment and amended judgment entered in No. 88-414-M of the district court, including the award of attorney's fees and costs, are REVERSED and the case is REMANDED for a new trial for the defendants on the securities claim. In No. 90-2266, San Juan County's request for attorney's fees on appeal is DENIED. With respect to the RICO claim of San Juan County against the defendants, the cause is REMANDED to the district court to determine whether a new trial on the RICO claim should be granted.

Our reversals of the judgment and the amended judgment in No. 88-414-M of the district court make it unnecessary for us to consider the merits of the claims of error in No. 90-2275 respecting the inclusion in the amended judgment of the pretrial stipulations as to successor liability of Liberty Capital. Both Liberty Capital's request that the amended judgment be partially vacated and San Juan County's request for sanctions and attorney's fees are therefore DENIED.

Furthermore, in connection with No. 91-2166, in light of the reversals of the judgment and amended judgment entered in No. 88-414-M of the district court, it is unnecessary for us to consider the claims of error in the order quashing the writ. The findings concerning the garnishment writ are VACATED as moot. In No. 91-2166, the request of San Juan County for attorney's fees and costs is DENIED.

IT IS SO ORDERED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. 88-414-M Civil

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, and THE SAN JUAN COUNTY TREASURER,
*Plaintiffs*,

v.

LIBERTY GROUP, a California Limited Partnership, *et al.*,
*Defendants*.

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Memorandum Opinion and Order
Judge E. L. Mechem
Senior United States District Judge

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(Filed November 1, 1990)

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### MEMORANDUM OPINION AND ORDER

This matter came on for consideration on the following post-trial motions filed by the parties: (1) plaintiffs' and defendants' cross-motions to amend the judgment; (2) defendants' motion for a new trial on the 10b-5 counts on behalf of Doyle Holmes, Norman Gurley, and Liberty Group; (3) defendants' motion for a judgment notwithstanding the verdict (JNOV) or in the alternative for a new trial on the RICO count on behalf of Norman Gurley and Liberty Group; and (4) defendant Doyle

Holmes' motion for JNOV or in the alternative for a new trial. Having considered the motions and responses, and being otherwise fully advised in the premises, I find that the defendants' motion for a new trial on the 10b-5 counts is not well taken and it is denied. Defendants' motion for JNOV or new trial on the RICO count is not well taken and it is also denied. Defendant Doyle Holmes' motion for a JNOV is well taken and it will be granted. Plaintiffs' and defendants' cross-motions to amend the judgment are each well taken. The judgment will, therefore, be amended accordingly.

## Background

The Board of County Commissioners of San Juan County brought this suit against Liberty Group, Liberty Partners, Inc., F.M.G. Partners, Liberty Capital Markets, Prudential-Bache Securities, Inc., Chester A. Walker, Doyle Holmes, Robert Holmes, Steve Holmes, James Graham, and Norman Gurley, The County alleged a variety of state and federal fraud charges, violations of the Federal RICO Act, breach of implied contract, and breach of fiduciary duty. Mr. Ron Ashcroft, the County Treasurer at the time of the transactions in question, was originally named as a plaintiff. However, Mr. Ashcroft was not named in the Second Amended Complaint and at the outset of the trial the parties agreed that Mr. Ashcroft was no longer a plaintiff. By my order of September 25, 1989, defendant Prudential-Bache was dismissed as were plaintiffs' claims for mail and wire fraud. Plaintiffs' claims against defendant James Graham were dismissed without prejudice pursuant to a stipulated order on August 3, 1990. A trial of the remaining parties and claims was held before a jury on August 20 through 23, 1990. At the conclusion of defendants' evidence, I directed a verdict in favor of defendants Robert Holmes, Steve Holmes, and Chester Walker. The judgment in favor of these three defendants is not at issue. Defendants' motion for a directed verdict in favor of Doyle Holmes on all counts was denied.

At the outset of the trial, the following stipulated facts were read to the jury:

> These are the uncontroverted facts that the parties have agreed to. They are in the form of stipulations and you should regard these facts as having been proved.
>
> . . . .
>
> Liberty Group (Liberty) was a California limited partnership, since dissolved. Liberty Partners, Inc. (Liberty Partners) is a California corporation. F.M.G. Partners is a California general partnership consisting of Liberty Partners and, at the time of the events of this case, Chester Arthur Walker, Jr., general partner of F.M.G. [Partners, and] Liberty Capital Markets, Inc. [Liberty Capital].
>
> . . . .
>
> The following named defendants held the following positions with Liberty, Liberty Partners, Liberty Capital, and F.M.G.
>
> Chester Arthur, Jr. was a shopper for Liberty, a general partner of F.M.G., a partner in Liberty Partners.
>
> Doyle Laverne Holmes, Secretary of Liberty Partners, and President and Chief Executive Officer of Liberty Capital.
>
> Robert Clayton Holmes, President of Liberty Partners and Director of Liberty Capital.
>
> Steve Ray Holmes, Secretary of Liberty Capital.
>
> James Arthur Graham, Secretary and Treasurer of Liberty Partners and Director of Liberty Capital.
>
> Norman Andrew Gurley, an account executive of Liberty handling the San Juan County Brokerage Account No. 950844.

> Defendant Liberty Capital was a member of the National Association of Securities Dealers. From on or about June of 1986 to on or about January of 1987, Liberty Group acted as a broker and/or dealer for the County of San Juan in the transactions described herein.
>
> Defendant Liberty Capital is a California corporation which is the successor in interest to Liberty. On or about January 12, 1988, Liberty Capital filed an amended form BD with the New Mexico Securities Division stating that it was succeeding in the registration of Liberty as a broker/dealer and had assumed all assets and liabilities of Liberty.
>
> It is a member of the NASD, National Association of Securities Dealers, and was registered as a broker/dealer under the provisions of the New Mexico Securities Act.
>
> The defendant Norman Andrew Gurley is a resident of the State of California and was at all times material to the complaint employed as an account executive for Liberty.
>
> . . . .
>
> Liberty and Liberty Capital Markets operated at all times material as a broker/dealer and had entered into a clearing broker relationship with Prudential. Prudential was thereby acting as the clearing broker for Liberty and Liberty Capital Markets during all times material to this complaint on a fully disclosed basis.

During trial, plaintiffs chose only to pursue the claims of securities fraud in violation of Rule 10b-5 of the Securities Exchange Act and the Securities Exchange Commission and the Federal RICO claim. No jury instructions were offered or given on plaintiffs' remaining claims or on the theory of successor liability. The only theories of

liability that the jury was instructed on, and which were addressed by the special verdict, were the violation of Rule 10b-5 of the Securities Exchange Commission in transactions with San Juan County and violation of Section 1962(c) of the Federal RICO statute.

The jury found that defendants Liberty Group, Norman Gurley, and Doyle Holmes violated Rule 10b-5 and that defendants Liberty Group and Norman Gurley violated the RICO statute. The jury also found that as a result of these violations, San Juan County suffered damages in the amount of $188,223.09. A judgment on the jury verdict was entered by the Clerk of the Court on August 28, 1990.

## Discussion

### A. *Judgment Notwithstanding the Verdict*

In determining whether to grant a motion for JNOV, as for a directed verdict, the issue to determine is the sufficiency of the evidence. It is the law of this Circuit that the required strength of the evidence to permit a JNOV is governed by federal law. *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 612 (10th Cir. 1984). Under the federal standard, a JNOV is "appropriate only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *EEOC v. Prudential Federal Savings & Loan Ass'n*, 736 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) quoting *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974). In determining whether to grant a motion for JNOV, I may not weigh the evidence, weigh the credibility of the witnesses, or substitute my judgment for that of the jury. *Id.* Furthermore, I must view the evidence most favorably to the plaintiffs and give the plaintiffs the benefit of all reasonable inferences. *Id.*

Applying these standards to this case, I find that defendants' motion for JNOV on the RICO claims must be

denied. I note as a preliminary matter that in its motion and responses to defendants' various motions plaintiffs submitted exhibits and evidence that were not admitted at trial. My decisions, however, are based solely on evidence that was admitted at trial. The remainder of the material supplied by plaintiffs was not taken into consideration. Defendants argue that no evidence of an association-in-fact enterprise or pattern of racketeering activity was introduced as required under RICO. However, there was ample evidence presented at trial from which a jury could have reasonably found that both an enterprise and pattern of racketeering activity existed.

The RICO statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity . . . ." 18 U.S.C. Section 1961(4). An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit . . . . [I]t is an entity separate and apart from the pattern of activity in which it engages." *U.S. v. Turkette*, 452 U.S. 576, 583 (1980).

The stipulated facts that were read to the jury, which the jury was instructed to regard as priven, support the conclusion that Liberty Group was an enterprise that existed as a legitimate business entity engaged as a broker/dealer for the sale of securities separate and apart from the transactions in question. In addition, plaintiffs' exhibits Nos. 32 and 33 (documents addressed to the New Mexico Department of Regulation and Licensing, Securities Division regarding Liberty Group), indicate that Liberty Group conducted business in New Mexico. This evidence is sufficient to support a reasonable inference that an "enterprise" existed for purposes of plaintiffs' RICO claim.

To prove a pattern of racketeering activity under RICO, a plaintiff must show at least two racketeering predicate acts that are related and that amount to, or threaten, the likelihood of continued criminal activity.

*H.J., Inc. v. Northwest Bell Telephone Co.*, 57 L.W. 4951 (1989). It is not necessary to show that the acts were in the furtherance of multiple schemes. *Id.* The plaintiffs presented evidence of thirteen separate transactions between the County and Liberty Group through its agent, Norman Gurley, from June 1986 through January 1987. Plaintiffs claimed that the transactions constituted violations of Rule 10b-5 in order to find a pattern of racketeering activity under RICO. There was disputed, but ample, evidence for the jury to so find.

Plaintiffs' and defendants' experts both testified at length about the transactions in question. Plaintiffs' expert testified about how and why the transactions involved multiple excessive markups and failures to disclose material facts to the County in the sale of securities. Though defendants' expert contradicted plaintiffs' expert, it was for the jury to reconcile the difference.

Turning to defendant Doyle Holmes' motion for a JNOV on the Rule 10b-5 claim, I find that defendant's argument is well taken. As defendant correctly points out, liability for a 10b-5 sale of a security. *Williams v. Sinclair*, 529 F.2d 1383, 1389 and fn.10 (9th Cir. 1975); *Seattle-First Nat'l Bank v. Carlstedt*, 678 F.Supp. 1543 (W.D.Ok. 1987). All of the evidence presented showed that Doyle Holmes held no position with Liberty Group and was not involved with the transactions between Liberty Group and San Juan County. All of Doyle Holmes' conduct that plaintiffs complain of occurred during or after 1988, long after the purchase/sale of securities to San Juan County. Because all of the evidence presented "points but one way" and cannot support any reasonable inference to sustain plaintiffs' position, JNOV is appropriate and will be granted.

Defendant Holmes alternatively moves for a new trial for the reasons set out in the new trial motion filed on behalf of Liberty Group, Norman Gurley, and Doyle Holmes. When such an alternative motion is made, it is

essential that I rule on both the JNOV and the new trial motions. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Bailey v. Slentz*, 189 F.2d 406, 407 (10th Cir. 1951).

B. *New Trial*

Defendants Holmes, Gurley and Liberty Group move for a new trial on the 10b-5 counts claiming that the verdict was against the clear weight of the evidence, because damages were excessive as a result of passion and prejudice of the jury, because the court erred in permitting a jury trial, and because the court erred in its instruction to the jury on the issue of scienter.

If a court determines that a verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion on the issues of liability and damages, the court must order a new trial. *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981).

1. *Weight of the Evidence*

As already discussed, the jury verdict against Doyle Holmes' on the 10b-5 counts was clearly against the weight of the evidence. No evidence was presented linking him to the purchase or sale of the securities in question. Therefore, defendant Holmes' motion for a new trial will be granted, but only in the event that the judgment entered in favor of defendant Holmes on his motion for JNOV is reversed or set aside on appeal. *Bailey v. Slentz*, *supra* at 407.

Regarding defendants Liberty Group and Norman Gurley, the jury heard sufficient evidence to find liability on the 10b-5 counts. Though the evidence was disputed and contradictory evidence was also presented, the jury heard explanations about how the transactions were carried out, how the markups were calculated and found to be excessive, and that neither defendant Gurley or

Liberty Group ever advised the county treasurer of the excessive markups. The standard required for a new trial is less than that for JNOV. To grant a new trial, I must find that the jury verdict was against the weight of the evidence. *Brown v. McGraw-Edison Co., supra.* However, this does not mean that I can substitute my judgment for that of the jury. It must be clear that an erroneous result was reached, *Frank v. Bloom*, 634 F.2d 1245, 1254 (10th Cir. 1980), and that the verdict was clearly or overwhelmingly against the weight of the evidence. *Prebble v. Brodrick*, 535 F.2d 605, 617 (10th Cir. 1976). It would be an invasion of the province of the jury to grant a new trial merely because there was a sharp conflict in evidence, 6A Moores Federal Practice, Paragraph 59.80[5] (1986), which is exactly the case here. The evidence was sharply conflicting regarding all the issues that Liberty Group and Gurley address. It is not clearly or overwhelmingly in favor of either plaintiff or defendants and I will not disturb the jury's verdict.

2. *Excessive Damages as the Result of Passion or Prejudice*

Defendants also argue for a new trial or remittitur because the damages awarded were excessive as a result of passion or prejudice by the jury. Again, the evidence of damages was sharply conflicting. Defendants' and plaintiffs' experts each explained how they arrived at vastly different figures. The jury was instructed on the proper elements of damages for this case, and defendants are not claiming that the damage instructions were erroneous. Given the instructions, the jury accepted the calculations of plaintiffs' expert.

I find no evidence that the jury was motivated by passion or prejudice against the defendants. During deliberations, the jury sent a note that read, "Your Honor: Can Ron Ashcroft [the County Treasurer at the time of the transactions in question] be reprimanded as strongly as the law allows for his reprehensable [sic] handling of

county funds when we present our verdict?" In responses, I instructed the jury that "You should not report on the conduct of any of the parties or the witnesses." Contrary to defendants' position, the note from the jury does not demonstrate a predilection against defendants. The jury heard testimony from Mr. Ashcroft that could reasonably lead them to believe that Mr. Ashcroft failed to adequately monitor county accounts. The jury's opinion of Mr. Ashcroft, however, has no bearing on the defendants. The motion for a new trial or remittitur on these grounds is, therefore, denied.

3. *Untimely Jury Demand*

Defendants next argue that a new trial should be granted because it was error to permit a jury trial since plaintiffs' jury demand was untimely. This case was originally filed in State Court as a non-jury case in March 1988. In April 1988, the case was removed to this court and an answer and a Fed.R.Civ.P. 12(b)(6) motion were filed. A jury demand was filed on September 18, 1988. Defendants voiced no opposition to the jury demand as being untimely until August 15, 1990, five days before trial, in a letter to me. Prior to August 15, both parties proceeded to prepare this case as a jury trial. The parties prepared a stipulated pretrial order which acknowledged a jury trial and submitted jury instructions. A jury trial may be ordered with the consent of the parties. 9C Wright & Miller, Federal Practice and Procedures, Section 2333 (1971). "Consent for purposes of this rule need not be express. If one party demands a jury, the other parties do not object, and the court orders trial to a jury, this will be regarded as trial by consent." *Id.*; *see also Stockton v. Altman*, 432 F.2d 946 (5th Cir. 1970). Because of the untimely objection to plaintiffs' jury demand and the preparation of both parties for a jury trial, I deem defendants to have consented to a trial by jury. In any event, even if the jury demand was found to be a nullity, it would not constitute grounds

for a new trial. My findings and conclusions would issue from the trial already conducted. Defendants have not shown that any new or additional evidence would be needed in such circumstances. Defendants' motion for a new trial based on these grounds is, therefore, also denied.

4. *Erroneous Jury Instruction*

Lastly, defendants argue that new trial is required because of an erroneous jury instruction regarding scienter. Defendants objected to the portion of Instruction No. 24 that is underlined:

> The plaintiff in order to recover on his 10b-5 claim must show that the defendant acted knowingly, that is with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element, the plaintiff must prove, by the greater weight of the evidence that the defendant made material statements which he knew to be false, or made statements with reckless disregard for their truth or falsity *or knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision* or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Defendants now object on the grounds that the instruction allowed the jury to find liability based on negligence and because it failed to define recklessness, an omission that defendants now claim is highly prejudicial. However, during objections to instructions at trial, defendants' objection was that "[t]he scienter element requires an intent to deceive, manipulate, or defraud . . . . [Y]ou have to show something more than this, which would be more of a simplest negligence standard instead of a gross negligence standard." Defendants did not ob-

ject to the omission of a recklessness definition at trial. No party can claim error in the failure to give an instruction unless he objects to it before the jury retires. Fed.R.Civ.P. 51 and *Zimmerman v. First Federal Savings & Loan Ass'n*, 848 F.2d 1047 (10th Cir. 1988). Therefore, defendants' objection to the omission of an instruction on recklessness is not well taken.

Regarding defendants' claim that the underlined language in Instruction was erroneous "[a] party who claims plain error has the heavy burden of demonstrating fundamental injustice. *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974) *cert. denied* 422 U.S. 1007 (1975). In *Clegg* the Tenth Circuit addressed the question of whether a jury instruction adequately informed the jury on the issue of scienter in a Rule 10b-5 claim. The Tenth Circuit found that

> If the trial court had charged the jury in effect that untrue statements or omissions resulting from mere negligence *without any manner of scienter, conscious fault, intention, or recklessness* would have been justified a recovery . . . this would have been fundamentally or palpably wrong and subject to correction . . . .
>
> But for the very reason that the language of the act tells us that such a charge would have represented a fundamental departure from its purpose and meaning, we believe that the use in the instructions of the language of the rule *implied that simple negligence would not be enough.* To use there is an undoubtable implication of fault beyond mere carelessness in "engaging in any device, scheme, or artifice to defraud or the making of untrue statements of material fact or omitting to state any material fact necessary in order to make statements made in light of the circumstances not misleading." Laymen in the context of the other instructions would be likely to sense this even though there is ground for

> dispute among lawyers that "untrue" statements and the "misleading" of others by omissions to state material facts could result simply from innocent, though negligent, oversight.

*Id.* at 1362 (citations omitted, emphasis added).

The reasoning of the Tenth Circuit is pertinent in this case. Instruction No. 24, read in its entirety, clearly conveys that scienter is required to find liability on a Rule 10b-5 claim. Defendants have not met their burden of showing fundamental injustice to require a new trial. Defendants' motion is, therefore, denied.

C. *Amendment of the Judgment*

Plaintiff move to amend the judgment entered on August 28, 1990 because it does not reflect the parties' pretrial stipulation that Liberty Capital Markets is the successor in interest to Liberty Group, that Liberty Capital Markets assumed all assets and liabilities of Liberty Group and because it does not provide for treble damages, which plaintiffs are entitled to under the RICO statute. Defendants move to amend the judgment so that it is in accordance with the jury's verdict regarding the remaining defendants in whose favor the jury found, and to dismiss with prejudice those counts that were not submitted to the jury. Defendants concede that if the jury verdict on the RICO count is allowed to stand, the defendants found liable for the RICO violation will be joint and severally liable for treble damages plus costs and reasonable attorney fees.

I find both plaintiffs' and defendants' arguments to be well taken and the judgment will be amended accordingly. The amended judgment will also reflect my decision to grant defendant Doyle Holmes' motion for JNOV.

IT IS SO ORDERED.

Senior United States District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. 88-414-M-Civil

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, NEW MEXICO and RON ASHCROFT, SAN JUAN COUNTY TREASURER, *Plaintiffs*,

v.

LIBERTY GROUP, a California Limited Partnership; LIBERTY PARTNERS, INC., a California Corporation; F.M.G. PARTNERS, a California General Partnership; LIBERTY CAPITAL MARKETS, INC., a California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., a Delaware Corporation; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; JAMES GRAHAM; and NORMAN ANDREW GURLEY, *Defendants*.

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Defendants' Request for Civil Jury Instructions

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REQUESTED JURY INSTRUCTION NO. 32.

["Knowingly," "Scienter" Explained]

As to the third element, the county, in order to recover on its 10b-5 claim, must show that the Liberty defendants acted knowingly, that is, with a mental state embracing intent to deceive or defraud. In order to establish this element the county must prove by a preponderance of the evidence that this defendant stated material facts which they knew to be false, or stated untrue facts with reckless disregard for their truth or falsity or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Recklessness means conduct which involves an extreme departure from the standard or ordinary care. A person acts in reckless disregard if the risk is known to him, or it is obvious that an ordinary person under the circumstances would have realized the danger and taken care to avert the harm likely to follow. A person may be reckless within the meaning of the law even though he thought himself to be careful. But recklessness in more than mere negligence. Reckless conduct represents grossly unreasonable, rash or intemerate behavior.

In the context of securities law, a person acts recklessly if he makes a false statement with a reckless disregard for whether it is true or false. It is not necessary for you to find that the defendant intended to injure the plaintiff, but that he acted in reckless disregard of a risk of whether there was truthful basis in his representations, or in the case of an omission, that he recklessly disregarded the material nature of those omissions.

The question of whether a person acted with intent to defraud or with reckless disregard is a question of fact for you to determine, like any other fact question. It is a question involving one's state of mind.

Direct proof of state of mind is almost never available, and is not required. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case it is the county's burden to prove all of the elements by a preponderance of the Evidence.

Since an essential element of the county's case is intent to defraud of recklessness, it follows that good faith on the part of the defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the plaintiff to prove fraudulent intent and consequent lack of good faith by a preponderance of the evidence.

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Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, Section 101.05; Sand, et al. *Modern Federal Jury Instructions*, Inst. No. 82-8.

## APPENDIX D

### CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

*Section 1962.* Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct

or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

## CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

*Section 1961. Definitions*

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under sections 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-165 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State of local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957

(relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) "States" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which oc-

curred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State of political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General

to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

## FED. R. CIV. P.

*Rule 51. Instructions to Jury: Objection.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

No. 92-319

Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY,

*Petitioner,*

vs.

LIBERTY GROUP, A California Limited Partnership, NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California General Partnership; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; LIBERTY CAPITAL MARKETS, INC., A California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DON A. PROUDFOOT, JR.*
GRAHAM & JAMES
725 S. Figueroa Street
34th Floor
Los Angeles, CA 90017-5434
(213) 624-2500

ALEXIS H. JOHNSON
VICTOR MARSHALL & ASSOCIATES, P.C.
Twenty-First Plaza
Suite 405
Albuquerque, NM 87102
(505) 764-8180

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether a limited partnership can associate with, or be employed by, itself under 18 U.S.C. § 1962(c), Racketeering Influenced Corrupt Organizations Act ("RICO"), so that the limited partnership may be both the RICO "person" and the RICO "enterprise."

2. Was the Tenth Circuit correct in concluding that the trial court's scienter instruction improperly allowed liability under Rule 10(b)-5 (promulgated under the Securities and Exchange Act of 1934, 17 C.F.R. Section 240) formerely negligent conduct, and in concluding that respondents properly objected to the instruction.

## LIST OF PARTIES[1]

Board of Commissioners of San Juan County, Petitioner
Liberty Group, A California Limited Partnership,
Respondent
Norman Andrew Gurley, Respondent

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[1] The caption used by Petitioner in lieu of a list of parties is the caption from the action in the district court and is over-inclusive. The parties listed in the text are the parties to Appeal 90-2266, which is the single appeal that raises the RICO and 10(b)-5 issues on which Petitioner seeks review. In the two related appeals, Liberty Capital Markets, Inc. (in 90-2275), and Liberty Capital Markets, Inc., Liberty Group, and Prudential-Bache Securities, Inc. (in 91-2166) were also parties. These appeals were not decided on the merits by the Tenth Circuit Court of Appeals as the Court's decision in 90-2266 mooted them. *See*, Slip Opinion at Appendix A to Petition, p. 16a. The remaining defendants listed by Petitioner in the caption prevailed at the trial and no appeal involving them was taken. None of the respondents to this petition are corporations.

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The respondents, Liberty Group and Norman Andrew Gurley, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 965 F.2d 879 (10th Cir. 1992).

## RESTATEMENT OF THE CASE

In late 1985, petitioner, through its then county treasurer, Ron Ashcroft ("Ashcroft"), commenced a new investment policy in which a portion of the funds that petitioner did not immediately need were invested in various government and government-backed securities. Ashcroft aggressively, and profitably, traded these bonds throughout the first half of 1986 when interest rates were falling and bond prices were, consequently, rising. During this period, Ashcroft used several different broker/dealers for petitioner's transactions, including some that he continued to use both during the period that he dealt with respondent Liberty Group and after he stopped using respondent Liberty Group.

In June of 1986, petitioner began using respondent Liberty Group as one of its broker/dealers for the purchase and sale of government and government-backed securities. Petitioner completed thirteen transactions with respondent Liberty Group, seven purchases and six sales, with the last transaction occurring in January 1987. Respondent Liberty Group's account executive in charge of the transactions with the County was respondent Norman Andrew Gurley ("Gurley"). At the time of the last transaction with respondent Liberty Group, petitioner

continued to hold one bond it had purchased from respondent Liberty Group. That bond was ultimately sold in 1989 through another broker/dealer. Petitioner suffered an out-of-pocket loss (that is, the difference between the dollars it paid to respondent Liberty Group to purchase bonds and the amounts it ultimately received back) of approximately $147,000.

In March 1988, petitioner filed suit against respondent Liberty Group. The final form of the complaint contended that respondents Liberty Group and Gurley had defrauded the County, in violation of Rule 10(b)-5 and RICO, by failing to reveal excessive mark-ups and concealing the mark-ups by adjusted trades (a trade made away from the market price in a manner that avoids recognition of a loss), and churned the account. There was substantial dispute at trial between the parties' experts over whether the mark-ups charged by respondent Liberty Group were excessive (and thus had to be revealed). In addition, there was a direct conflict in the evidence of Ashcroft and respondent Gurley and in the testiinony of the experts over whether the thirteen transactions over a six-month period constituted churning.

The jury returned a verdict in favor of all then remaining defendants (defendants Stephen and Robert Holmes, and Chester Walker were granted directed verdicts) except respondent Liberty Group, respondent Gurley, and Doyle Holmes. It found those three liable under Rule 10(b)-5 for damages of $188,223.09, and found respondents liable under RICO for treble damages and

attorneys' fees. The trial court granted Doyle Holmes' request for a JNOV, and respondents appealed.[2]

## REASONS FOR DENYING THE WRIT

### I. THE REQUIREMENT UNDER RICO § 1962(c) THAT THE "PERSON" BE DISTINCT FROM THE "ENTERPRISE" IS COMPELLED BY THE STATUTORY LANGUAGE AND HAS BEEN UNIFORMLY ADOPTED BY THE CIRCUIT COURTS OF APPEALS IN CIVIL CASES.

Section 1962(c) of RICO makes it unlawful "for any *person employed by or associated with any enterprise* . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . " (emphasis supplied). As the Tenth Circuit noted:

> "The language of the statute clearly contemplates that the 'person' charged will be distinct from the 'enterprise' since a person cannot logically be 'employed by or associated with' himself." Petition, Appendix A, p. 12.

Indeed, this case was pled, tried, and the jury was instructed (at petitioner's request), on this basis. The operative complaint, the Second Amended Complaint, alleged that the RICO enterprise was *an association in fact*

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[2] The Petition presents the "facts" in a completely one-sided manner and goes on at length, and misleadingly, about subjects, such as the exchange of correspondence between Doyle Holmes and petitioner and the amendment of the judgment, that have nothing whatsoever to do with the purported "Questions for Review" (Petition at pp. 3-5).

of Liberty Group, Liberty Partners, F.M.G. Partners, Liberty Capital Markets, Inc., Norman Gurley, Doyle Holmes, Prudential-Bache Securities, Inc., Chester Arthur Walker, Robert Holmes, Steve Holmes, and James Graham. Second Amended Complaint, ¶52, Joint App. at 62. The case was submitted to the jury on this basis[3]. Instruction No. 12, Joint App. at 260.

It was only in the district court's opinion ruling on the post-trial motions that the "enterprise" was identified as respondent Liberty Group. Memorandum Opinion and Order, Petition, Appendix B, at p. 22. Even then, petitioner, apparently conscious of the person-enterprise rule, did not take the position that respondent Liberty Group could be the enterprise or that the person did not have to be distinct from the enterprise under § 1962(c). Instead, on appeal, petitioner continued to insist that "The trial court correctly instructed the jury on the RICO claim" and quoted Instruction 12:

> "*the defendants and the enterprise cannot be the same and must be distinct.* The County has alleged that the Enterprise that existed in this case was in the form of a De Facto association; or an association in fact, between Liberty Group, Liberty Partners, Inc., FMG Partners, Liberty Capital Markets, Inc., Norman Andrew Gurley and Doyle Laverne Holmes." Petitioner's Answer Brief in No. 90-2266, at pp. 16-17. Emphasis supplied by petitioner.

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[3] Omitting, of course, the defendants who had by then been dismissed, to wit: Prudential-Bache, Robert Holmes, Steve Holmes, Chester Walker, and James Graham.

Petitioner then argued at length, contrary to the conclusion reached by the Tenth Circuit, that it had *factually* established an association in fact enterprise separate and distinct from the "person," respondent Liberty Group. *Id.* at pp. 18-25.

It is in its Petition that petitioner argues, for the first time, that respondent Liberty Group was the enterprise and strains to give an appearance of "conflict" in the interpretation of § 1962(c) over whether or not the "person" must be distinct from the "enterprise." The purported conflict is entirely artificial and does not exist.

Ten circuits have dealt with the requirement of a separate person and enterprise under § 1962(c) in civil cases and all ten have concluded that the "enterprise" and the "person" must be distinct, and in two of them, certiorari was sought, and denied, on this very issue. *See, Yellow Bus Lines v. Local Union 639,* 839 F.2d 782, *modified on other grounds,* 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied,* ___ U.S. ___, 115 L. Ed. 2d 1007 (1991) and *Bennett v. United States Trust Co.,* 770 F.2d 308 (2nd Cir. 1985), *cert. denied,* 474 U.S. 1058 (1986). The remaining cases in which this interpretation was upheld are: *Garbade v. Great Divide Mining and Milling Corp.,* 831 F.2d 212, 213 (10th Cir. 1987); *Schreiber Distributing Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1396 (9th Cir. 1986); *Bishop v. Corbitt Marine Ways, Inc.,* 802 F.2d 122, 123 (5th Cir. 1986); *Schofield v. First Commodity Corp. of Boston,* 793 F.2d 28, 30 (1st Cir. 1986); *Horoco v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384, 401 (7th Cir. 1984), *aff'd on other grounds* 473 U.S. 606 (1985); *B.F. Hirsch v. Enright Refining Co.,* 751 F.2d 628, 633 (3rd Cir. 1984); *Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408, 411 n. 6 (8th

Cir. 1984), *judgment vacated on other grounds*, 469 U.S. 1205 (1984); *NCNB National Bank of North Carolina v. Piller et al.*, 814 F.2d 931 (4th Cir. 1987).

The only arguably contrary authority is *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), a criminal case which has never since been followed in any Court of Appeals on this point, and which is, in any event, quite different factually and legally from the cases following the person-enterprise rule, including this case. In *Hartley*, the corporate defendant and two employees had masterminded a scheme in which defective breaded shrimp was sold to the military by elaborate ruses and with the assistance of bribed government inspectors. The corporate defendant and the two employees were convicted of conspiracy, mail fraud, and violation of § 1962(c). A challenge was mounted to all of the convictions raising some 14 arguments. As to RICO, the challenge was to the indictment, claiming it was invalid because it failed to allege that the "person" and the "enterprise" were separate. The Court of Appeals rejected this challenge noting that, in any event, an association in fact of the company, the employees, and the government inspectors was proven and could have been alleged in the indictment. This should be contrasted with this case, in which an association in fact was *alleged*, but not *proven*. In view of the distinguishing factual features of *Hartley*, and its uniform rejection as a precedent in civil cases by all of the circuits that have dealt with the issue, there is no basis for concluding that there is any real conflict between the circuits.

The balance of petitioner's attempts to create the appearance of a conflict are a mishmash. Petitioner

asserts that several cases reflect conflicts within circuits. However, in each instance, the purported conflict is illusory. The court in each case reaffirms the requirement of different entities for the "person" and the "enterprise" under § 1962(c) because of the associative and employment requirement. At the same time, these courts noted that under § 1962(a), different entities are not required because that subsection does not have an associative or employment requirement, but rather an investment requirement.[4]

Thus, in *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 397 (7th Cir. 1985), the court stated:

> "We held that subsection (c) *did* require separate entities as the person and the enterprise . . . " (emphasis supplied), but concluded that (a) did not because " 'Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate.' "

The situation is the same in the other two cases cited by the County. In *Garbade v. Great Divide Mining and Milling Corporation, supra,* the court said:

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[4] In two of the cases, *United States v. Benny,* 559 F. Supp. 264 (N.D. Cal. 1983), *affd.*, 786 F.2d 1410 (9th Cir. 1986), *cert. denied,* 479 U.S. 1017 (1986) and *McCullough v. Suter,* 757 F.2d 142 (7th Cir. 1985), the issue was not whether there had to be a distinction between the "person" and the "enterprise," but rather whether there was such a distinction between an individual and his multi-employee sole proprietorship, and held that on the facts of those cases, there was such a distinction. In both cases the Courts of Appeals reaffirmed the basic rule as to the person-enterprise distinction. *Benny,* at 786 F.2d 1416, and *McCullough* at p. 144.

> "The complaint further alleges that the corporate defendant, Great Divide, violated 18 U.S.C. § 1962(c). The trial court dismissed the corporation on the ground that it could not in these circumstances be both an "enterpirse" and a "person" within the purposes and wording of the section. *We must agree.*" (emphasis supplied).

Similarly, in *Schreiber Distributing Co. v. Serv-well Furniture Co., supra,* while the court, in dealing with § 1962(a) did not require a distinct "person" and "enterprise," it adopted the reasoning of the Seventh Circuit in *Horoco, supra,* which required such a differentiation under § 1962(c).

There is no conflict among the circuits, or within any circuit, over the "person-enterprise" rule under § 1962(c). The uniform, routine interpretation is that the language of subsection (c) compels proof of an enterprise separate and distinct from the person charged. This case was pled and tried on this basis and the jury was so instructed. Petitioner's difficulty in this case arises not from any misinterpretation of the statute, but from its fundamental failure of proof of the enterprise (an association in fact) that it alleged.

Having failed to demonstrate any conflict between the circuits in interpreting § 1962(c), petitioner turns to an attempt to persuade that this clear issue of statutory interpretation is somehow an "important issue of law" that should be decided by this court. This attempt also fails; indeed, it seems to go nowhere.[5] It provides no

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[5] Perhaps the explanation for the somewhat odd, out of place, feel to much of petitioner's brief on the RICO issue is that

meaningful analysis of the current rule and makes no real attempt to explain how its vaguely articulated "alternative" would work in practice or, more importantly, in the context of this case. It is no more than an abstract, obtuse, discussion of principles of vicarious criminal liability as somehow related to the interpretive question presented.[6] It offers no basis for a grant of the Petition.

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it is copied, word-for-word, but completely out of context, and without attribution, from a copyrighted law review article: *Innocence by Association: Entities and the Enterprise Rule Under RICO*, 63 Notre Dame L. Rev. 179 (1988) (except for the insertion of "limited partnership" wherever corporation appears, and the placing in text of some footnote references). For example, the entirety of subsection D. "An Alternative Approach" (at pp. 15-18) is taken word-for-word from the law review article at pages 208-212. In addition, approximately a third of pages 7-13 of the Petition are also copied in bits and pieces from the law review article. It is not particularly surprising that this "cut and paste" analysis leads nowhere. Interestingly, petitioner omits any reference to the conclusion of the article which is that the whole person/enterprise rule should be abandoned and replaced with application of *criminal* rules relating to vicarious liability, including a requirement that the "person" intended to benefit the enterprise. Of course, adopting such a rule, which is of dubious value, would have no effect in this case in which there was no effort to plead or prove that respondent Gurley "intended to benefit" respondent Liberty Group by his challenged conduct; this case, at petitioner's insistence, was tried on an association in fact theory.

[6] *See*, footnote 5, *supra* for the probable explanation.

## II. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT THE CRITICAL SCIENTER INSTRUCTION WAS FATALLY FLAWED BECAUSE IT PERMITTED A FINDING OF SCIENTER BASED ON MERE NEGLIGENCE, AND THAT RESPONDENTS HAD PROPERLY OBJECTED TO THE INSTRUCTION.

The Petition makes absolutely no attempt to demonstrate that the questions posed by the Tenth Circuit's ruling on the scienter instruction fit any of the accepted criteria for granting certiorari, and indeed, they do not.

There is no dispute that Rule 10(b)-5 liability requires scienter and that mere negligence is not enough to supply that scienter. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976). The issues posed to the Court of Appeals were two: first, did the instruction given prejudicially permit recovery for mere negligence; and second, did respondents properly object to the scienter instruction in accord with Federal Rules of Civil Procedure, Rule 51. The first issue poses a straightforward analysis of the instruction to determine whether the language used in one prong of the instruction permitted liability for mere negligence, and a fact-bound determination of whether the error was prejudicial. The second issue is at root simply a factual inquiry into whether the objection made adequately alerted the district court judge to the flaw in the instruction so that he could and should have altered it. Both issues, since the instruction objected to was not a standard jury instruction, present no issue of broad application; they are applicable simply and solely to this case.

In any event, the Tenth Circuit's decision was clearly correct. The instruction given (Instruction 24, Joint App. 274) had four prongs to it. The four prongs require a showing that the defendant: (1) made material statements which he knew to be false; or (2) made statements with a reckless disregard for their truth or falsity; or (3) knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision; or (4) knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

The first prong is a plain vanilla misrepresentation of a material fact; the second prong a reckless misrepresentation.[7] The fourth prong is omission of a fact *knowing* that knowledge of the fact is necessary to make the parties' other statements not misleading. The problem is the third prong. It should have been the "reckless" equivalent of the fourth prong; that is, it should have allowed a finding of scienter if the defendant *recklessly* disregarded whether or not disclosure of the fact would be significant in making an investment decision, i.e., necessary to make

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[7] This portion of the instruction is also faulty because it omits materiality as a factor with respect to this prong, and does not contain a definition of "recklessness," both of which were contained in the instructions requested by respondents. On appeal, however, respondents did *not* rely on these errors, preferring to focus on the more obvious flaw in the scienter instruction. For reasons difficult to fathom, the Petition, at pp. 20-21, acts as if the Tenth Circuit had reversed and remanded for failure to include a definition of "recklessness" in the instructions when in fact it did not.

his other statements not misleading. Instead, it says "should have realized [known]" that the facts should be disclosed. This is the language of negligence, not recklessness, and the Tenth Circuit so held.

As factually the evidence on scienter was close, the Court of Appeals found the error prejudicial. Since respondents specifically objected to the instruction, and in particular the third prong, on the grounds that under the *Hochfelder* case, "you have to show something more than this, which would be more of a simple[] negligence standard instead of a gross negligence standard," it is difficult to comprehend why petitioner claims a failure to properly object. As the Tenth Circuit noted:

> "The defendants' objection that *Hochfelder* requires a finding of gross negligence rather than simple negligence was sufficient to fully inform the court of the specific nature of and grounds for the objection." Slip Opinion, Petition, Appendix A, at p. 10a.

The scienter instruction, respondents' objection to it, and the Tenth Circuit's ruling raise no issues on which the courts are in conflict or of broad legal significance; they are heavily related to the specific facts of this case and no reason for granting the petition exists.

## III. CONCLUSION

Respondents respectfully submit that application of the person-enterprise rule to require under § 1962(c) that the person be distinct from the enterprise results from a straightforward reading of the section, a reading given to

it by all of the circuit courts that have considered it in civil cases. Moreover, with respect to the scienter instruction, petitioner gives no reason for granting certiorari, and the issues with respect to it were correctly decided. Accordingly, no reason exists for a grant of the petition.

WHEREFORE, respondents respectfully pray that the Writ of Certiorari be denied.

Respectfully submitted,

DON A. PROUDFOOT, JR.*
GRAHAM & JAMES
725 S. Figueroa Street
34th Floor
Los Angeles, CA 90017-5434
(213) 624-2500

ALEXIS H. JOHNSON
VICTOR MARSHALL & ASSOCIATES, P.C.
Twenty-First Plaza
Suite 405
Albuquerque, NM 87102
(505) 764-8180

* Counsel of Record

Supreme Court, U.S.
FILED
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No. 92-319

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY,

*Petitioner*,

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; LIBERTY CAPITAL MARKETS, INC., A California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITIONER'S REPLY BRIEF

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J. M. DURRETT, JR.
San Juan County Attorney
112 S. Mesa Verde
Aztec, NM 87410
(505) 334-9481

JAMES L. DOW *
DOW LAW OFFICE, P.A.
P. O. Box 128
Carlsbad, NM 88221
(505) 885-2185

* Counsel of Record

*Attorneys for Petitioner*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether a limited partnership can associate with, or be employed by, itself under 18 U.S.C. § 1962(c), Racketeering Influenced Corrupt Organizations Act ("RICO"), so that the limited partnership may be both the RICO "person" and the RICO "enterprise".

2. Was the Tenth Circuit correct in concluding that the trial court's scienter instruction improperly allowed liability under Rule 10(b)-5 (promulgated under the Securities and Exchange Act of 1934, 17 C.F.R. Section 240) for merely negligent conduct, and in concluding that respondents properly objected to the instruction.

## LIST OF PARTIES

Board of Commissioners of San Juan County, Petitioner

Liberty Group, A California Limited Partnership, Respondent

Norman Andrew Gurley, Respondent

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IN THE

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No. 92-319

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BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY,

*Petitioner,*

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; LIBERTY CAPITAL MARKETS, INC., A California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

## PETITIONER'S REPLY BRIEF

---

### REASONS FOR GRANTING THE WRIT

#### THE DISTRICT COURTS AND CIRCUIT COURTS ARE IN CONFLICT WHETHER THE PERSON MUST BE DISTINCT FROM THE ENTERPRISE UNDER RICO § 1962(a) AND § 1962(c).

Section 1962(a) makes it unlawful "for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to

use or invest, directly or indirectly, any part of such income, or proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . ."

Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity. . ."

Section 1961 defines the term "enterprise": "As used in this chapter— . . . (4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . ."

From a reading of these three sections of RICO, the language of the statute with regard to the meaning of the term "enterprise" is in conflict.

The Trial Court identified the enterprise as Respondent Liberty Group and overruled Respondent's Motion for JNOV. One of the grounds for Respondent's motion was that the person and enterprise must be distinct. Joint App. at 307. The Tenth Circuit reversed the Trial Court's RICO decision, holding: "The required separation between the RICO Enterprise and the Defendant Liberty Group was not established and JNOV should have been granted to Liberty Group as to any liability under Section 1962(c). Appendix A, P. 15a.

The record is replete with evidence that the enterprise Liberty Group received all of the monies the County was defrauded of, and Liberty Group conducted or participated in the affairs of the enterprise through a pattern of racketeering activity and the jury so found. Joint App. P. 299.

The Tenth Circuit's decision in the case at bar is in direct conflict with its earlier case of *Garbade v. Great Divide Mining and Milling Corporation*, 831 F.2d 212

(10th Cir. 1987). The Tenth Circuit, in *Garbade*, id., stated:

> "Section 1962(c) makes it unlawful for a 'person' to enter the activities of an 'enterprise' using racketeering activities. References are to 'employed by' and 'associated with'. The section does not relate to corporate or enterprise liability. *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir.); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F. 2d 384 (7th Cir.); *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir.).
>
> There is no indication whatever that the corporation was in any way benefited by the alleged acts of the defendant. The existence of such benefits have provided in several cases an exception to this conclusion and to impose corporate liability under § 1962(a). . . .
>
> The 'person' and 'enterprise' combination liability can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity. *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F. 2d 384 (7th Cir.) (; also where it is to disgorge illegally obtained proceeds of illegal activities, *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 393 (9th Cir.).
>
> In the case before us, the defendant corporation received no illegally obtained funds as contemplated by the statute. Its dismissal by the trial court was proper."

Thus, the Tenth Circuit is in direct conflict with its own decisions on this very question. Other circuits are also in conflict with this decision, namely, *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986). In *Schofield*, id., the court in discussing the conflicting views resulting from the conflicting legislative language in 1962(a) and 1962(c) the court reasoned:

> "The language in section 1962(a) does not require a relationship between the person and the enterprise as

does section 1962(c), and so it does not require the involvement of two separate entities. Applied to the facts of this case, section 1962(a) would prohibit FCCB, the person, from using ill-gotten gains in FCCB, the enterprise. In contrast, section 1962(c) requires that the culpable person be 'employed by or associated with' an enterprise; we think it stretches the language too far to suggest that a corporation can be employed by or associated with itself. This approach to the two subsections

> 'thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.' Haroco, 747 F.2d at 402.

See also Masi v. Ford City Bank and Trust Co., 779 F.2d 397, 401-402 (7th Cir. 1985); Bennett v. United States Trust Co. of New York, 770 F.2d at 315 (2d Cir. 1985); B. F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d Cir. 1984); The Bruss Co. v. Allnet Communication Services, 606 F. Supp. 401, 407 (N.D. Ill. 1985).[2]

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[2] We recognize that funneling corporate liability into subsection (a) may affect plaintiffs in ways other than simply in the drafting of the complaint under one subsection rather than another. See Note, Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability, 65 Boston U. L. Rev. 561, 596-598 (1985). For example, subsection (a) requires a showing of the source of income and proof that funds were channeled into the corporation. It also covers only wrondoing involving money. But if neither section 1962(a) nor section 1962(c) cover all methods of corporate wrongdoing, it is up to Congress, and not the courts, to expand the scope of the statute. We rely on section 1962(a) only to show that our reading of section 1962(c) does not insulate corporations from all liability."

Liberty Group hid the $208,000.00 fraud it perpetrated upon San Juan which was not discovered until the New Mexico State Auditor discovered the fraudulent transactions. Liberty Capital Markets, Inc., the successor-in-interest to Liberty Group, Appendix A at P. 4a-5a.[1] Acting through its President, Doyle Holmes, Liberty Group refused to return the $208,000 and tried to mislead the San Juan County into believing the adjusted trades were not fraudulent transactions, *In Re Transamerican Securities, Inc.*, S.E.C. Administrative Proceeding No. 3-5810, and that the SEC, the NASD, and the New Mexico Securities Division had investigated the transactions and these government entities had never apprised Liberty Group of any irregularities or illegality in the manner in which these trades were conducted. Plaintiff's Exhibit No. 47, admitted into evidence, Tr. Vol. III, Pages 121-123. As a result of these investigations, NASD censured Gurley and Liberty Capital Markets, the successor corporation to Liberty Group, in a companion investigation of similar adjusted trades with Bernalillo County, New Mexico. *District Conduct Committee For District No. 25 v. Liberty Capital Markets, Inc., et al.*, N.L.R.B. Complaint No. LA-4248. The New Mexico Security Division, as a result of these investigations, censured the same defendants for the adjusted trades perpetrated not only on San Juan County, New Mexico, but on Bernalillo County, New Mexico and the City of Santa Fe, New Mexico.

Thus, this is a clear case that falls in the exception to the "person"—"enterprise" liability exceptions referred to in the Tenth Circuit's decision of *Garbade v. Great Divide Mining and Milling*, supra. Seven of the Circuit

[1] Liberty Capital Markets was incorporated as a California corporation and succeeded to all of the assets and liabilities of Liberty Group shortly before the County could bring suit to recover the $208,000 from Liberty Group and Liberty Capital Markets as a direct result of the fraudulent transactions.

Courts that have considered the exception to the 1962(a) "Person-Enterprise" rule have acknowledged the exception to the rule.[2]

The 7th Circuit speaking in *Masi v. Ford City Bank & Trust Co.*, supra, noted that the exception to the rule in *Haroco*, supra, was essentially dicta; however, the 7th Circuit adopted the reasoning in *Haroco*, supra, stating:

> "However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also the perpetrator. As we parse subsection (a) a 'person' (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principle within the meaning of 18 U.S.C. Section 2, and if the person uses the income in the establishment or operation of an enterprise affecting commerce. Subsection (a) does not contain any language in subsection (c) which suggests that the liable person and enterprise must be separate. . . . However, we adopt it as our holding because of the reasoning expressed in Haroco and because we find that this literal reading of the statute is in accord with the Supreme Court's approach in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

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[2] Corporations who have used the racketeering practices and who have received the ill-gotten gains and benefited therefrom are excepted from the 1962(c) "person"—"enterprise" rule. As stated in *Haroco Inc. v. American National Bank & Trust Co.*, supra: The person enterprise liability can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity. *Haroco, Inc. v. American National Bank & Trust*, supra. *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (7th Cir. 1985); *Bennett v. United States Trust Co. of NY*, 770 F.2d 315 (2nd Cir. 1985); *B. F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3rd Cir. 1984); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir.); *Schofield v. First Commodity Corporation of Boston*, 793 F.2d 28 (1st Cir. 1986).

Moreover, the interpretation that insulates the enterprise from liability under Section 1962(c) is not inconsistent with the remedial purposes of RICO. *United States v. Turkette*, 452 U.S. 589. A culpable enterprise may be held liable under another section of RICO 1962(a). The language in 1962(a) does not require a relationship between the person and the enterprise, as does 1962(c), and so it does not require the involvement of two separate entities. *Schofield v. First Commodity Corporation of Boston*, supra.

Applied to the facts of this case, Section 1962(a) would prohibit Liberty Group, the person, from using the ill-gotten gains in Liberty Group, the enterprise.

The Tenth Circuit in its decision in the case at bar further held:

> "With respect to the defendant Gurley, he may be a person under 1962(c). Thus, the defect in proving a 'person' separate from the 'enterprise' is not present with respect to Gurley and a new trial for such defect is not required."

The Tenth Circuit in its decision has given a free ride to the guilty party, Liberty Group, who perpetrated the fraud and received all its benefits and passed them on to Liberty Capital Markets, while placing the full brunt of RICO on the employee 'Gurley', all contrary to the intent of Congress. As stated in *U. S. v. Benny*, 559 F. Supp. 264 (N.D. Ca. 1983):

> "Hence, the person whose business was at the core of the racketeering activity would be immunized while the persons who worked for the enterprise could be prosecuted. *Surely Congress could not have intended such an absurd and unjust result.*" (emphasis supplied)

The Eleventh Circuit Court is in conflict also with the Circuit's adopting the "person"—"enterprise" exclusion from liability. This circuit outright repudiated this ex-

clusionary rule in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982). The *Hartley* court stated:

> "if an individual were named as the enterprise, and a group of persons engaged in a pattern of racketeering activities with that individual, it would defy reason to suggest that the central figure (the enterprise) could not also be prosecuted under RICO."

## CONCLUSION

As in the case at bar, the Tenth Circuit's decision as in countless other cases in other circuits has allowed the culpable culprit (Liberty Group—the enterprise) to conduct its illegal activities with complete impunity, contrary to the intent of Congress in enacting RICO. This is an "important issue of law" which the court must decide. Seven of the ten Circuits that have considered this issue have adopted the exception to the "person"—"enterprise" exclusionary rule. The Circuit Courts are in conflict on this issue.

WHEREFORE Petitioner respectfully prays that the Writ of Certiorari be granted.

Respectfully submitted,

J. M. DURRETT, JR.
San Juan County Attorney
112 S. Mesa Verde
Aztec, NM 87410
(505) 334-9481

JAMES L. DOW *
DOW LAW OFFICE, P.A.
P. O. Box 128
Carlsbad, NM 88221
(505) 885-2185
*Attorneys for Petitioner*

* Counsel of Record